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ONTARIO LABOUR RELATIONS BOARD REPORTS

April 1987



ONTARIO LABOUR RELATIONS BOARD

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MONTHLY HIGHLIGHTS

June, 1987

Editor: Colleen Edwards, Solicitor

The following are scope-notes of some of the decisions issued by the Ontario Labour Relations Board and appearing in the May Report:

Accreditation - Bargaining Unit - Construction Industry - Accreditation sought for low-rise part of residential sector of the construction industry - Accreditation certificate issued in 1973 for entire residential sector but employers association had never exercised the bargaining rights granted in respect of the low-rise part of the residential sector - Earlier refusal by Board to divide the residential sector into high-rise and low-rise parts - Bargaining rights for low-rise part of sector declared abandoned - Pattern of collective bargaining at time application made looked at - Bargaining unit described in terms of low-rise part of residential sector appropriate - Accreditation certificate issuing

INDEPENDENT PLUMBING & HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46; RE METROPOLITAN PLUMBING & HEATING CONTRACTORS' ASSOCIATION; File No. 2211-86-R; Dated May 6, 1987; Panel: H. Freedman, D. A. MacDonald, J. Redshaw (22 pages)

Bargaining Rights - Construction Industry - Reconsideration - Effect of earlier decision to call into question applicant's bargaining relationships with several employers - Stay requested pending full reconsideration and application to Minister for designation - No legal requirement that power of reconsideration be exercised by the panel making the original decision but no grounds here to reconsider, vary, revoke or stay the original decision

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE EKT INDUSTRIES INC., TAMARRON GROUP INC., TAMARRON CONSTRUCTION LIMITED; File Nos. 1856-83-R, 2087-83-M; Dated May 25, 1987; Panel: R. O. MacDowell, M. Eayrs, N. Wilson (11 pages)

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Certification - Constitutional Law - Respondent's operations including a feed mill, feed warehouse, and seed cleaning mills - Board not having jurisdiction to hear application - Canada Wheat Board Act declaring operations to be works for the general advantage of Canada - Mills and warehouses falling within federal jurisdiction

W.G. THOMPSON & SONS LIMITED; RE U.F.C.W.; RE GROUP OF EMPLOYEES; File No. 3150-86-R; Dated May 20, 1987; Panel: R. D. Howe, R. M. Sloan, B. L. Armstrong (10 pages)

Certification - Interference in Trade Unions - Intimidation and Coercion - Petition - Unfair Labour Practice - Three employees called individually into management's office and questioned about union organizing drive - Board concluding most employees would have become aware of interviews and their contents - Bonus cheques given to employees - Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union - Exertion of pressure and undue influence breach of Act - Petition not voluntary - Union certified and posting ordered

HAYLOFT STEAKHOUSE LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES; File Nos. 3126-85-R, 0135-86-U; Dated May 7, 1987; Panel: R. J. Herman, J. A. Ronson (dissenting), R. R. Montague (29 pages)

Construction Industry Grievance - Discharge - Discharge of employee who left job site without permission - Analysis of principles of progressive discipline and just cause in the construction industry - Five day suspension substituted for discharge

COMSTOCK INTERNATIONAL LTD.; RE B.B.F., LOCAL 128; File No. 0876-86-M; Dated May 29, 1987; Panel: K. Petryshen, J. A. Ronson, D. Patterson (11 pages)

Construction Industry Grievance - Whether in circumstances it was appropriate for the Board to exercise its discretion to substitute some other penalty for the suspension imposed by the respondent on the grievor - Deference by arbitrator appropriate as long as employer considers only relevant factors when imposing discipline - Disciplinary response must fall within range of just and reasonable penalties - Ten day suspension substituted for suspension imposed by employer

NADROFSKY CORPORATION; RE I.U.O.E., LOCAL 793; File No. 3330-86-M;

<i>Administrative Officer</i>	D.K. AYNLEY
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<i>Board Solicitors</i>	C. EDWARDS
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Dated May 28, 1987; Panel: G. T. Surdykowski, G. O. Shamanski, B. L. Armstrong (11 pages)

Duty of Fair Representation - Settlement reached between union and Domgroup following conversion of Dominion Stores into franchises known as Mr. Grocer stores - Complainant without job as a result of settlement - No breach of fair representation duty by union when reaching settlement - Union reached best settlement it could under circumstances

DI CESARE, SALVATORE; RE R.W.D.S.U., LOCAL 414; RE DOM GROUP; File No. 3244-86-U; Dated May 29, 1987; Panel: P. Hughes (7 pages)

First Contract Arbitration - Employer refusing to agree to just cause clause in collective agreement - Union engaging in unsuccessful strike - Bad faith bargaining complaint by union dismissed - Whether employer's position was without reasonable justification - Board assessing whether proposal was reasonable in objective terms - Section 40a requiring a departure from bad faith bargaining jurisprudence - Settlement of first contract directed

FORMULA PLASTICS INC.; RE U.F.C.W.; File No. 2728-86-FC; Dated May 27, 1987; Panel: J. McCormack, J. Sarra, R. M. Sloan (dissenting) (24 pages)

First Contract Arbitration - History of employer unfair labour practices - Employer threatening plant closure - Employer refusing to bargain until employees given a representation vote - Refusal to recognize the bargaining authority of the union forming basis for directing the settlement of a first collective agreement by arbitration

WALTER TOOL AND DIE LTD.; RE U.S.W.A.; File No. 3326-86-FC; Dated May 1, 1987; Panel: R. D. Howe, I. M. Stamp, H. Peacock (17 pages)

Practice and Procedure - Unfair Labour Practice - Employer objecting to Board hearing complaint because of delay - Employer's argument that complaint should have been filed when complainant became aware of alleged conspiracy to remove complainant from job rejected - Reasonable for complainant to file complaint only when alleged conspiracy made public - Not desirable for complainants to file suspicions - Board not prepared to dismiss complaint on basis of delay - Reverse onus provision applying to employer - Employer directed to proceed first

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Chair JUDGE R.S. ABELLA

Alternate Chair R.O. MACDOWELL

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CONSUMERS DISTRIBUTING COMPANY LIMITED, TEAMSTERS' UNION, LOCAL 419 AND SEAN FLOYD; RE GHIAN SAROOP PERSAUD; File No. 0999-86-U; Dated May 29, 1987; Panel: P. Hughes, J. A. Rundle (dissenting), D. A. Patterson (20 pages)

Remedies - Sale of a Business - Unfair Labour Practice - Employees of predecessor employer not hired by successor - Successor employer not obliged to continue the employment practices of the predecessor because collective agreement had expired at time of sale - No refusal by respondent to enter into an employment relationship with grievors because no evidence adduced that application made or others hired - Knowledge by respondent that unidentified persons wanted to work for it not sufficient to prove breach of Act - Complaint dismissed

NEW HOLIDAY TAVERN, THE HOLIDAY (A PARTNERSHIP), HOLIDAY ENTERTAINMENT INC. (GENERAL PARTNER), FORMERLY HARVEY WEISFELD AND ALAN CHARNEY, C.O.B. AS; RE INTERNATIONAL BEVERAGE DISPENSERS AND BARTENDERS UNION, LOCAL 280; File No. 2410-85-U; Dated May 1, 1987; Panel: O. V. Gray, F. W. Murray, R. Wilson (dissenting) (15 pages)

ANNOUNCEMENTS

DON AYNLEY has announced his retirement as Registrar, effective July 31, 1987.

VIRGINIA ROBESON, Manager of Administration, has been appointed Registrar, effective August 1, 1987.

JANET TRIM has been appointed as a part-time Board Member representing management, effective May 27, 1987.

* * * * *

The decisions listed in this bulletin will be included in the publication, Ontario Labour Relations Board Reports. Copies of advanced drafts of the OLRB Reports are available for reference at the Board Library.

<i>Senior Solicitor</i>	N.V. DISSANAYAKE
<i>Board Solicitors</i>	C. EDWARDS
	K.A. MacDONALD

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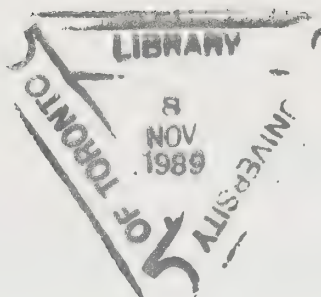
**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1987] OLRB REP. APRIL

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Colleges Collective Bargaining Act - Duty of Fair Representation - Duty to Bargain in Good Faith - Unfair Labour Practice - Employees seeking to enforce bargaining duty by means of fair representation complaint - Board declining to determine whether breach of bargaining duty - Union's conduct during negotiations not breach of fair representation duty - Complaint dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *F. C. Burnet* and *L. Collins*.

APPEARANCES: *C. Hillmer, J. Abramowitz and B. Lyons* for the complainants in Board File No. 1875-84-U; *C. Hillmer and R. McElhinney* for the complainants in Board File No. 2689-84-U; *C. Hillmer and J. Makela* for the complainants in Board File No. 0088-85-U; *Ian Roland, Kevin Whittaker, Ron Martin and Grant Bruce* for The Ontario Public Service Employees Union; *F. G. Hamilton and Terence J. Blundell* for the The Ontario Council of Regents for Colleges of Applied Arts and Technology and the Board of Governors, Sheridan College of Applied Arts and Technology.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER L. COLLINS; April 29, 1987

1. These are complaints under section 77 of the *Colleges Collective Bargaining Act* (also referred to in this decision as the "Act") in which the complainants allege that they have been dealt with by the Ontario Public Service Employees Union (referred to in this decision as "OPSEU" and as the "Union") contrary to section 76 of the Act, which provides:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

(For ease of exposition, the duty imposed by that provision, and by the equivalent provision found in section 68 of the *Labour Relations Act*, will be referred to from time to time in this decision as the "duty of fair representation".)

2. The complaints were consolidated by the Board on the first day of hearing. However, on the sixth day of hearing, the parties advised the Board that they had agreed that the Board should hear the complaint of Jane Abramowitz and Brian Lyons (in File No. 1875-84-U) in its entirety, and that the other complaints (File Nos. 2689-84-U and 0088-85-U) should be held in abeyance, on the understanding that this panel of the Board would remain seized of them and would apply to those complaints all of the evidence adduced in these proceedings, in the event that

the other complainants subsequently elected to proceed with their complaints. (For ease of exposition, the term "complainants" will be used in the remainder of this decision to refer solely to Ms. Abramowitz and Mr. Lyons, unless otherwise indicated.)

3. During the eleven days of hearing of this matter, the Board heard the testimony of twelve witnesses. In addition to that oral evidence, the Board has before it twenty-four affidavits, which were admitted as evidence on the agreement of the parties, and 105 exhibits, which were entered during the course of these proceedings. Following the completion of the evidentiary portion of the proceedings, the parties agreed to submit written argument to the Board, on the understanding that the Board would subsequently hear oral argument unless the parties agreed that it was unnecessary for the Board to do so. Pursuant to that arrangement, the complainants filed over 135 pages of detailed, written argument. The Union responded with forty-four pages of written submissions. A written response was also filed by counsel for the Ontario Council of Regents for Colleges of Applied Arts and Technology (the "Council") and Sheridan College of Applied Arts and Technology ("Sheridan College"). The complainants subsequently filed fifty-five pages of written reply argument with the Board. On October 23, 1986, the hearing of the matter concluded with oral argument.

4. In making the findings of fact set forth in this decision, the Board has carefully considered all of the aforementioned oral and documentary evidence, the oral and written submissions of the parties, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered the inferences that may reasonably be drawn from the totality of the evidence.

5. The primary thrust of the complainants' case is that the Union contravened section 76 of the Act by:

- (1) bargaining in bad faith and failing to make a reasonable effort to conclude a collective agreement in its 1984 negotiations with the Council, and
- (2) intentionally misleading the complainants with respect to those negotiations.

6. Section 5 of the Act requires the Council and the Union to meet within thirty days from the giving of notice to bargain and to "negotiate in good faith and make every reasonable effort to make an agreement" (or to renew the agreement, as the case requires). The analogous provision of the *Labour Relations Act* is section 15. (For ease of exposition, the duty imposed by section 5 of the *Colleges Collective Bargaining Act*, and by section 15 of the *Labour Relations Act*, will be referred to from time to time in this decision as the "bargaining duty".) Enforcement of the section 15 bargaining duty falls to the Board in proceedings under section 89 of the *Labour Relations Act* (or to the Courts in circumstances in which the Board finds it appropriate to give consent to prosecute under section 101). Enforcement of the bargaining duty imposed by section 5 of the *Colleges Collective Bargaining Act*, on the other hand, is not within the Board's jurisdiction. Under section 56(1)(f) of the Act, it is the duty of the College Relations Commission (the "Commission") "to determine, at the request of either party or in the exercise of its discretion, whether or not either of the parties is or was negotiating in good faith and making every reasonable effort to make or renew an agreement". (The only other enforcement mechanism for the section 5 bargaining duty is prosecution which, by virtue of section 89(6) of the Act, cannot be instituted without the consent of the Board.)

7. In the context of the *Labour Relations Act*, the Board has consistently held that employees do not have status to assert a violation of the bargaining duty imposed on the trade union and the employer by section 15 of that legislation. See, for example, *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179, in which the then Chair of the Board wrote, in part, as follows in dismissing a complaint in which ten employees alleged that their employer had violated what is now section 15 of the *Labour Relations Act* by bargaining in bad faith with respect to a pension plan:

13. Section 14 [now section 15] reads:

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

Sections 13, 15, 35, 37, and 42 [now sections 14, 16, 41, 44, and 50], together with the scheme of the Act reflected in many other provisions, make it clear that the parties to a collective agreement are the employer and the trade union, although the employees in the defined bargaining unit are undoubtedly bound by the agreement. See for example *Re Governing Council of the University of Toronto and Service Employees Union, Local 204* (1974), 5 L.A.C. (2d) 304 (Weatherill). Thus, on the clear words of the statute, we are of the view that the obligations and duties contained in section 14 are matters of legal interest only to these parties.

That case involved an attempt by bargaining unit employees to establish a contravention of section 15 by their employer. However, the Board has indicated that similar considerations apply in the context of a complaint by bargaining unit employees that their trade union has contravened section 15 of the Act. In *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421, a group of K-Mart employees alleged that their trade union had contravened a number of provisions of the *Labour Relations Act*, including section 15, by signing a collective agreement on the basis of certain terms of settlement which had been rejected by a narrow majority of bargaining unit employees. In dismissing that complaint, the Board wrote, in part, as follows:

27. The complainant contends that by concluding a collective agreement on terms which the majority of the bargaining unit had previously rejected, the trade union was “bargaining in bad faith”. There is no merit to this contention. In the first place, a group of individual employees does not have status to assert a violation of section 15. The section, by its terms appears to create obligations and regulate relations only as between the trade union and the employer (see *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179)....

See also *Dominion Stores Limited*, [1985] OLRB Rep. Jan. 71.

8. Thus, the Board has consistently held in the context of the *Labour Relations Act* that employees do not have status to assert that their trade union or their employer has violated the duty to bargain in good faith and make every reasonable effort to make a collective agreement. That position is supported by sound labour relations policy considerations, and is equally applicable in the context of section 5 of the *Colleges Collective Bargaining Act*. The bargaining duty imposed by those provisions is owed by the trade union to the employer, and vice versa. Just as the trade union bargaining with the employer is in the best position to know whether or not the employer is living up to its legal responsibilities under the bargaining duty, so too is the employer bargaining with the trade union in the best position to know whether or not the trade union is fulfilling its legal responsibilities in that regard. Each of the parties at the bargaining table is also in the best position to determine whether it would serve the interests of collective bargaining to file a complaint alleging a contravention of the bargaining duty by the other party, and whether or not to proceed with such a complaint once it has been filed. In the instant case, the Council filed such a complaint with the Commission (under section 56(1)(f) of the Act), but ultimately elected not to proceed with it. The Union instructed its counsel to prepare a similar complaint against the Coun-

cil, but ultimately elected not to file such a complaint. To permit bargaining unit employees on an individual or group basis to seek enforcement of the bargaining duty by means of a complaint alleging a violation of the Union's duty of fair representation would be a totally unwarranted instance of permitting an individual or group to do indirectly what they would not be permitted to do directly, and would not, in our view, further harmonious relations or serve any other valid labour relations purpose. Moreover, it could have the detrimental effect of giving rise to conflicting rules of substantive law. As noted above, enforcement of the section 5 bargaining duty is not within the jurisdiction of this Board. It can only be enforced by the Commission (under section 56(1)(f) of the Act) or by the Courts (in circumstances in which the Board finds it appropriate to give consent to prosecute under section 89(6) of the Act). Thus, if the Board were to construe section 76 of the Act as providing a vehicle by which the scope of an employee organization's obligations under section 5 of the Act could be adjudicated, it is possible that the Board's interpretation of the bargaining duty in that context would conflict with the Commission's interpretation of that duty in the context of proceedings under section 56(1)(f) of the Act. In that regard, the fact that the Legislature made it the duty of the Commission (and not this Board) to determine, *at the request of either party or in the exercise of its discretion*, whether or not either of the parties is or was negotiating in good faith and making every reasonable effort to make or renew a collective agreement, provides further support for our conclusion that section 76 was not intended by the Legislature to be, and is not, a vehicle by which bargaining unit employees can substitute this Board for the Commission as the body responsible for interpreting the bargaining duty in the context of the *Colleges Collective Bargaining Act*.

9. In his able written submissions on behalf of the complainants, Mr. Hillmer acknowledged that there is no Board jurisprudence supportive of the complainants' position that although bargaining unit employees have no status to bring a complaint alleging a breach of section 5 of the Act, they can nevertheless use section 76 of the Act to obtain an adjudication of the issue of whether or not their bargaining agent has contravened the bargaining duty which it owes to their employer. However, he contended that, as a matter of law, a violation of a trade union's duty to bargain in good faith and make every reasonable effort to make a collective agreement constitutes a breach of its duty of fair representation. The sole case which he cited in support of that contention was *Swatts v. United Steelworkers of America* (1984), 116 LRRM 2110 (U.S. District Court for the Southern District of Indiana). In that case, the plaintiffs were workers who were left without jobs following an unsuccessful strike at a steel plant. The Court declined to grant the respondent trade union's motion for summary judgment on the plaintiffs' claim that the union had breached its duty of fair representation by bargaining to an impasse over a non-mandatory subject, namely the inclusion of two new plants in the bargaining unit. The Court recognized that the union's action, if proved, would constitute an unfair labour practice by the union vis-a-vis the employer. However, it also indicated that if the plaintiffs proved that the union had acted to sacrifice the jobs of certain members in an attempt to increase the size of the bargaining unit and thereby increase its own strength, a breach of the union's duty of fair representation "would probably be shown", as a lack of the "complete good faith" and "honesty of purpose" required of a union by that duty in the context of negotiations "would probably be present". Although the adjudication of the union's unfair labour practice vis-a-vis the employer fell within the jurisdiction of the National Labour Relations Board, the Court found that it had jurisdiction to adjudicate the plaintiffs' claim that the union's actions contravened its duty of fair representation. In reaching that conclusion, the Court observed (at page 2118) that the "[National Labour Relations] Board's primary responsibility is adjudication of unfair labour practices where the union or the employer is the aggrieved party, not where the union allegedly acted wrongly to harm its members.... Where the employer is not involved ... the Court sees no danger of disrupting national labor policy or encountering conflicting rules of substantive law by retaining jurisdiction."

10. We do not read the *Swatts* case as authority for the proposition that, as a matter of law, a violation of a trade union's bargaining duty constitutes a breach of its duty of fair representation. Such a proposition is clearly untenable. A trade union might, for example, breach its bargaining duty by taking to impasse a demand for work assignment which could form the subject matter of a jurisdictional dispute (see, for example, *Toronto Star Newspapers*, [1979] OLRB Rep. Aug. 811). However, conduct of that type, which is intended to advance what the trade union perceives to be the best interests of the employees whom it represents, would not likely constitute a contravention of the trade union's duty of fair representation. The same might also be true of a trade union's attempt to extend its bargaining rights by pressing that matter to impasse in collective bargaining (see, generally, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, at paragraph 29, and *United Brotherhood of Carpenters & Joiners of America*, [1978] OLRB Rep. Aug. 776). What the *Swatts* case does appear to indicate is that facts which might lead to a finding that a trade union has breached the bargaining duty which it owes to an employer might also, in some circumstances, support a finding that the trade union has breached the duty of fair representation which it owes to bargaining unit employees. We respectfully agree with that conclusion. However, the issue in such a case would not be whether the trade union has bargained in good faith and made every reasonable effort to make a collective agreement; it would be whether the trade union has acted in a manner which is arbitrary, discriminatory, or in bad faith in the representation of any of the employees. Indeed, the question of whether or not the trade union has contravened the bargaining duty which it owes to the employer would be irrelevant in such proceedings.

11. For the foregoing reasons, it is neither necessary nor appropriate in these proceedings to determine whether or not the Union breached the duty which it owes to the Council to negotiate in good faith and make every reasonable effort to make an agreement. Having carefully considered all of the bargaining actions of which Ms. Abramowitz and Mr. Lyons complain, including the high priority which the Union gave to its workload proposal (as described below), the Union's strict adherence to its timetable for negotiations, its insistence on receiving a "last offer" at a time when items other than workload had received very little discussion, and its uncompromising conduct during mediation, we have concluded that the Union did not act in a manner that was arbitrary, discriminatory, or in bad faith in the representation of the complainants. The gist of this aspect of the complainants' case is that the Union conducted the negotiations with no intention to conclude a collective agreement. However, the evidence does not support that allegation. To the contrary, the evidence clearly indicates that the Union was quite intent upon concluding a collective agreement, but wished to do so on terms that included a workload formula, which was its primary objective in the 1984 negotiations. It is not the function of this Board to comment on the wisdom of the approach which the Union adopted, or to "second guess" its decisions concerning the bargaining tactics which it chose to employ in an effort to achieve that objective. Differences of opinion regarding those matters must be resolved through the Union's political processes, not through proceedings such as the instant complaint.

12. Having had the benefit of reading the dissent of our colleague, Board Member F. C. Burnet, we respectfully disagree with his conclusion that the Union contravened section 76 of the Act "by refusing to receive the Employer's offer of September 25". Section 59(1) of the Act stipulates a number of conditions which must be fulfilled before any employee covered by the Act can lawfully strike. One of those conditions, under clause (d) of that subsection, is that "the offer of the Council in respect of all matters remaining in dispute between the parties last received by the employee organization that represents the employee is submitted to and rejected by the employees in the bargaining unit by a vote by secret ballot conducted under the supervision of and in the manner determined by the Commission". (For ease of exposition, that offer will be referred to in this decision as the "offer last received".) On August 30, 1984, during the course of mediation, the Union requested and obtained from the Council an "offer last received" within the meaning of sec-

tion 59(1)(d). The vote contemplated by that provision was conducted on September 18. The offer last received was rejected by approximately 95% of the voters. Mediation resumed on September 24. On the following day, the Council sought to present a new written offer to the Union through the mediator. Although the members of the Union bargaining committee were willing to consider any proposals which the Council was prepared to make orally through the mediator, they were not willing to receive a written offer as they were concerned that such an offer might give rise to confusion regarding whether or not it was an "offer last received" requiring another last offer vote. Although they were personally of the view that such an interpretation of section 59(1)(d) was not warranted as it would enable the Council to extend negotiations indefinitely by tabling a series of "offers last received", they were aware that a somewhat similar issue had arisen during an earlier round of negotiations with respect to the support staff bargaining unit, and that it had caused considerable confusion. Their profound distrust of the Council's representatives also played a role in their adoption of that position, as they "did not want any tricks to be played."

13. Having thoroughly discussed with the mediator their position and the concerns which prompted them to adopt it, the members of the Union bargaining committee were very surprised when the mediator came to their caucus room on September 25 and announced that he was adjourning mediation and that management was "on their way down" with an offer. In an attempt to gain time to think about the situation and to confer with counsel, Ronald Kelly, who (as described later in this decision in greater detail) was the chairperson of the Union bargaining committee, asked the mediator to "stop them". When the mediator returned a few seconds later and indicated that the Council's representatives were outside the door, Mr. Kelly told him that the Union bargaining committee would not talk to them. The mediator then went to the doorway, opened the door, and stated simultaneously to the Council representatives outside and the Union representatives inside, "I can see no way in which I can facilitate a settlement at this time. I am therefore adjourning mediation." He then turned to the Union representatives, said "Management has an offer for you", and walked away, letting the door close behind him. The Council representatives then knocked on the door three or four times, but the Union representatives did not open the door or otherwise acknowledge their presence. (There is conflicting evidence concerning whether the door was locked or unlocked at that time. It is unnecessary to resolve that conflict as, in our view, it is irrelevant in the context of this complaint.) In order to "buy time", the Union representatives decided to exit the room with their hands in their pockets, and their briefcases tucked under their arms, so that the Council representatives would be unable to deliver the new offer to them. As it turned out, those precautions were unnecessary; when they entered the corridor, no one was there.

14. The Council caused copies of the new offer to be delivered to the Union's headquarters and to Mr. Kelly's hotel room later that day. A copy was also forwarded to his home by courier. Mr. Kelly sought legal advice before opening the offer, which by that time had been made public by the Council. Copies of the offer were also sent by the college presidents to all of the faculty members in the bargaining unit at their homes. The new offer was unacceptable to the Union bargaining committee as it did not contain a workload formula or offer any other solution to the workload problems which had been raised and discussed at length at the bargaining table; it simply withdrew the Council's proposal (included in the August 30 "offer last received") that the teaching hour and contact day limits contained in the 1983-84 collective agreement be eliminated. The new offer also contained a "take away" proposal regarding sick leave benefits, and a monetary offer which was unacceptable to the Union bargaining committee. The terms of that offer were discussed with faculty members by members of the Union bargaining committee who visited college campuses prior to the strike vote which was conducted on October 2. Over 75% of the faculty members who voted marked their ballots in favour of a strike, thereby implicitly rejecting the Council's offer of September 25. That offer continued to be a source of controversy between the parties until October

15, when the mediator provided the Union bargaining committee with an assurance that the Council did not intend it to be an “offer last received” within the meaning of section 59(1)(d) of the Act.

15. For the reasons described above, it is neither necessary nor appropriate for us to comment on whether or not the Union’s actions regarding the Council’s offer of September 25 were violative of its bargaining duty. For purposes of this complaint, it is sufficient to record our conclusion that its actions regarding that offer did not contravene its duty of fair representation, as they were neither arbitrary nor discriminatory, and were not taken in bad faith. Those actions were taken with a view to maximizing the Union’s bargaining power, and avoiding unduly protracted negotiations, by maintaining strict adherence to the Union’s timetable for negotiations, which called for a strike vote to be conducted on October 2, a written strike notice to be issued on October 11 (pursuant to section 59(1)(f) of the Act), and a strike to commence at midnight on October 16, unless a settlement had been reached by that time. (For the foregoing reasons, we also make no comment on whether or not the Union’s strict adherence to that timetable violated the bargaining duty which it owed to the Council.)

16. As noted above, the second basis upon which the complainants seek to establish a contravention of section 76 is their allegation that the Union intentionally misled them with respect to the 1984 negotiations. The gist of that aspect of the complainants’ case is that the Union “conducted those negotiations with no intention to conclude a collective agreement, while systematically misleading its membership regarding its intentions and actions”. As indicated above, we have concluded that the evidence does not support the complainants’ allegation that the Union conducted the 1984 negotiations with no intention to conclude a collective agreement. However, it remains for us to determine whether the Union’s communications with members of the bargaining unit concerning the negotiations were violative of its duty of fair representation.

17. The Union holds bargaining rights for approximately 7,600 academic employees (also referred to in this decision as the “faculty”) at Ontario’s twenty-two colleges of applied arts and technology (the “colleges”). The Union’s bargaining proposals are prepared through a two-stage process. Proposals are formulated and prioritized by the locals at each of the colleges, and are subsequently assembled in a “demand book” which is circulated to each of the locals prior to the provincial demand setting meeting. Three delegates from each college attend that meeting to prioritize those demands and finalize what is to be included in the Union’s bargaining proposals.

18. For a number of years, workload has been an issue of considerable importance to the Union and to many of faculty whom it represents. In 1975, an arbitration award provided the parties with some parameters as a starting point for future negotiations concerning that contentious issue. Various intervening events, such as the passage of the (Federal) Anti-Inflation Act, precluded the parties from dealing with that issue in depth prior to 1981. In preparation for the 1981 negotiations, the Union’s negotiating team conducted a workload survey. The 1,800 responses which were tabulated clearly demonstrated that many faculty members were of the view that there was a serious workload problem in the colleges. In response to the need (identified by a factfinder) for a common data base respecting workload, the parties established an Employer/Employee Relations Committee, which conducted a workload survey early in 1982. During the 1982 negotiations, the Union proposed a workload formula based upon a formula which was in use at Ryerson Polytechnical Institute (the “Ryerson formula”). The parties spent a considerable amount of time discussing that formula during those negotiations. In commenting on that issue, the factfinder (appointed pursuant to section 8 of the Act) recommended that the parties continue to study the issue and suggested that they expand their data base respecting it. Negotiations concerning that issue ceased with the passage of the *Inflation Restraint Act*. In the fall of 1983, the parties conducted a

second joint workload study, the results of which did not differ significantly from their first joint study, which itself had yielded results similar to the Union's initial survey.

19. The Union held its 1984 (provincial) academic demand setting meeting on March 31 and April 1, 1984. Following a presentation of the priorities put forward by each of the colleges, delegates prioritized the demands by secret ballot. That vote assigned top priority (by a substantial majority) to "instructional assignments". In the demand setting portion of the meeting, motions and discussion concerning that matter resulted in a workload formula (similar to the one tabled by the Union in the 1982 negotiations) being proposed as the Union's top priority. Proposals on other issues, including seniority and salaries, were also adopted at that meeting, and a seven-person negotiating committee was elected. As indicated above, the chairperson of that committee was Ronald Kelly, who also served as its spokesperson. Mr. Kelly was an experienced negotiator who had been elected to the Union's (academic) bargaining committee in each of the previous five years. He had also been the president of his OPSEU local since 1977.

20. A motion was also passed at that meeting that a bulletin in tabloid form be prepared (for distribution to all members in the academic bargaining unit) containing the following information:

- 1) Our major bargaining demands and the rationale for them.
- 2) A special feature on our workload demand, showing system-wide workload trends and comparisons with other post-secondary teachers and inability of our contract to protect our members, and examples of how the new workload formula would operate.
- 3) A special feature on how workload increases in the colleges are damaging the quality of education.

21. Pursuant to that motion, 8,200 copies of a newsletter called the CAAT Calendar were printed. Over 5,700 of those copies were mailed to Union members in the academic bargaining unit in June of 1984. Other copies were distributed in bulk on college campuses. Although it was not received by all of the faculty, we are satisfied on the totality of the evidence that the Union took reasonable steps to arrange for its distribution by mail and by bulk distribution. That publication contained a number of articles concerning workload, including the following which appeared as two of the "lead stories":

New workload credits proposed

Discussion on Article 4, Instructional Assignments, has begun between the parties. The union has suggested revisions which, if adopted, will credit faculty with teaching hours and the related work which teachers must perform before entering and after leaving classes, labs, clinics, field placements - wherever teachers are assigned to work with students.

Related work includes course preparation, student evaluation, curriculum development, special assignments, travel time, and consideration of the additional time which must be allotted to teachers when teaching in more than one language.

It is proposed that the colleges continue to maintain teaching schedules which include maximum teaching hours per week (although not as high), and maximum teaching hours per year (also somewhat reduced), and a limit on the number of contact days per year (also open to negotiation).

Further, it is proposed to establish a limit on the number of student contact hours per employee, i.e. the sum of the number of students scheduled for each contact hour assigned to an employee.

The term, "contact hour" would be understood to mean any fifty (50) minute period or less in which an employee is assigned by the college to meet with one or more students. This is the standard contact hour prevailing in the colleges today, as established by a joint faculty/management survey undertaken by the Employer/Employee Relations Committee.

The proposal includes provision for premium payments when any maxima are exceeded, and when employees are assigned to teach between 6:30 p.m. and 6:30 a.m., or on Saturdays or Sundays.

Course Preparation

The union proposes that course preparation be credited on a time scale that varies in accordance with whether a) the course is a new course, not taught in the last three years; or b) a repeat of last year's course; or c) an additional section or sections of the same course

Student Evaluation

Management has been asked to agree that student evaluation takes time and that such time must be credited as part of a teacher's workload.

The proposal calls for teachers and immediate supervisors to agree in advance on the hours required for curriculum development, i.e. the design of a new course or the revising of an existing course, and special assignments such as committee work, course co-ordination, or research projects (to name a few).

The same agreement is called for when employees are required to teach in more than one language or when an employee undertakes an assignment that requires travel.

The faculty negotiating team proposes that the aggregate credit of assigned contact hours and related work shall be limited to a weekly maximum.

Changes have been proposed to ensure that the College Instructional Assignment Committee can function more efficiently and that faculty can seek redress through grievance when that committee doesn't resolve disputes concerning inequitable workload and onerous assignments.

Finally, it is proposed that in each college there shall be one counsellor for each unit (or part thereof) of 500 students and that additional counsellors be appointed when counsellors are required to do work with other than college students.

All our work counts: Faculty

There's more to teaching than classroom presentations. There is a continuous need for teachers to prepare for each class, evaluate student achievement, develop and review curriculum, plan and supervise field placement of students, and more.

This is the message being brought to college administrators by the negotiating team elected to represent the 7,000 teachers, librarians and counsellors in Ontario's 22 Colleges of Applied Arts & Technology.

"For years the management of the colleges has measured the worth of teachers in terms of the number of hours spent in the classroom," explains Ron Kelly, chairperson of the CAAT Academic negotiating team. "It's time that management agreed to count not only the teaching hours but the related work which teachers must perform each week."

That related work includes preparation, evaluation, student contact and counselling, field work and job placement, travel time to off-campus assignments, committee membership, curriculum review and development, academic research, professional development and special assignments such as the production of learning material for widespread college use.

Management proposes instead to eliminate all limits on assigned teaching hours per week and

assigned teaching days per year, and does not propose to give greater consideration to related work.

"We aren't giving any thought to limits on assigned teaching hours per week," says lawyer Chris Riggs, chief negotiator for the Council of Regents acting on behalf of the Boards of Governors, the administrators and the management of the colleges.

Riggs explains that management wants the right to assign unlimited teaching hours per week in what he describes as "chunking" - assigning massive numbers of teaching hour for periods of many weeks followed by weeks without teaching hours.

In those non-teaching weeks, faculty will be directed to perform work such as the production of teaching material, supervising field placement, and other duties deemed appropriate by college managers.

The academic negotiating team has proposed to Riggs and the college administrators that there be a revision of the present contract provisions governing the work of faculty. The present provisions are largely unchanged from those that applied in 1967/68 when the colleges were established.

It is anticipated that the Union's proposed revision will serve several purposes. It will allow for change and continued expansion of Ontario's highly successful colleges of applied arts and technology. It will ensure equitable workloads for all teachers, maintain standards and guarantee students a better education.

That publication also expressly warned faculty members that a strike might well be necessary in order to obtain significant changes in working conditions in view of the Committee of Presidents' prediction that "no significant changes in working conditions will take place before a major work stoppage". (The Committee of Presidents is comprised of the twenty-two college presidents.)

22. A folder containing the following information, as well as the workload proposal which the Union had tabled with the Council in May of 1984 and the workload provision from the July 1, 1983 to June 30, 1984 collective agreement between the Ryerson Faculty Association and the Board of Governors of Ryerson Polytechnical Institute, was distributed to the members of the bargaining unit (by their divisional delegates) in September of 1984:

Good teaching takes a lot of effort. There's a lot of work to be done before a teacher enters a class. There's a lot of evaluation of student effort to be done outside classes.

You can't stand before a class day after day, or work with students in laboratories hour after hour without current notes, overheads, audio-visual aids, and projects for students.

Nor can you ask a student to spend days researching and writing term papers if you aren't prepared to spend considerable time evaluating and commenting on the student's research and efforts.

Incredibly, the people controlling Ontario's community colleges don't know this or they just don't care.

THIS IS THE ISSUE THAT ISOLATES COLLEGE MANAGEMENT FROM FACULTY AND STUDENTS

In management's view, the only measure of a teacher's effort is the number of hours spent in classrooms and laboratories. For obvious reasons there is a limit on the number of those hours. However, management wants to remove the limits.

Management proposes to eliminate all limits on assigned teaching hours per week and assigned teaching days per year, and does not propose to give any consideration to the related work that is part and parcel of good teaching.

College faculty could be assigned unlimited hours per week in classrooms. They could be assigned to work around the clock - seven days a week.

This is management's response to the growth and success that has distinguished the colleges since they were established in 1966/67.

Ontario's colleges have been dynamic institutions. They have grown until today they serve 120,000 full-time students. There are 600,000 registrations in part-time day and evening courses. The students may come directly from high school, or they may be workers who need skills upgraded or updated.

As our response to the needs of our students, faculty representatives have proposed amendments to the Collective Agreement for Academic Employees in the colleges. Specifically, faculty have called for a review and reorganization of the constraints governing teaching and learning. Management refused the review.

We have proposed that colleges and faculty can better serve students now and in the future when teaching assignments are considered in conjunction with the related work necessary for good teaching.

That related work includes preparation, evaluation, student contact and counselling, field work and job placement, travel time to off-campus assignments, committee membership, curriculum review and development, academic research, professional development and special assignments such as the production of learning material for widespread college use.

Management won't hear of it. They won't give faculty credit for any effort other than hours spent in the classroom.

The faculty proposed that the basis for the review and revision could be found in the agreement reached between faculty and management at Ryerson Polytechnical Institute. Ryerson was the model which served to shape the colleges initially. But college management refused to consider the ways and means by which Ryerson remains dynamic.

The center pages of this folder spell out the terms of the most recent workload Article in force at Ryerson. Contrast the provisions of that Article with the Union's proposed "Instructional Assignments" Article printed below and on the back page of this folder.

As you read and compare these related Articles, remember that the negotiators for college management say that the provisions of this sort are unworkable, impractical and offensive to the professionalism of faculty.

But why, if it works at Ryerson wouldn't it work in Ontario's community colleges? And why won't college management agree to revise and review the constraints which interfere with the continued growth and success of the colleges?

23. The complainants are critical of those and other communications because they lack numbers, calculations, and examples. However, having decided, in a legitimate exercise of their discretion as a bargaining committee, to table a workload formula containing no numbers, in an attempt to concentrate on negotiating the principle of a workload formula which recognized that a faculty member's job consists not only of teaching but also of "related work" (including course preparation, student evaluation, and curriculum development), and having further decided to defer any discussion of numbers until that principle had been accepted by the Council, the bargaining committee did not act arbitrarily, discriminatorily, or in bad faith by omitting those numbers from its communications with faculty. In this regard, we note that it is not the Board's function under section 76 of the Act to determine whether the CAAT Calendar and the folder quoted above complied in all respects with the aforementioned motion; that is an internal Union matter beyond the purview of section 76. It is sufficient for the purposes of this case to indicate that the evidence as a whole falls far short of establishing that those numbers were intentionally withheld

from the membership in order to mislead them with a view to ultimately precipitating a strike which would not have occurred if the membership had been better informed about the Union's demands, as alleged by the complainants.

24. In reaching that conclusion, we have duly considered all of the evidence that was adduced before us, including the evidence concerning what was said to Ms. Abramowitz and Mr. Lyons (in the presence of Mr. Lyons' wife) on October 31, 1984 by Bob Smith, the Union's local chief steward at Sheridan College. At that time, the faculty were on strike and there was considerable resentment against Mr. Lyons and Ms. Abramowitz by persons on the picket line at Sheridan College. Mr. Smith was concerned about the potential aftereffects of that resentment. He was also concerned that the instant complaint, which had been filed by Mr. Lyons and Ms. Abramowitz on October 15, 1984, might prolong the strike by making it appear that the Union was divided and that the strike might collapse. Accordingly, he and another Sheridan College faculty member arranged to meet with Mr. Lyons and Ms. Abramowitz at Mr. Lyons' home to request that they participate in the strike to mollify their colleagues, and that they defer their complaints until after the strike was over. During the course of those informal discussions, Ms. Abramowitz asked Mr. Smith why numbers had not been included in the Union's communications to faculty concerning the proposed workload formula. In response to that question, Mr. Smith expressed his personal opinion that the numbers were not disclosed prior to the strike vote because many faculty members did not come to Union meetings, did not understand the bargaining process, would have been very concerned about the proposed numbers, and would not have supported the Union as they would not have understood that the numbers simply constituted a bargaining position. Ms. Abramowitz then asked Mr. Smith, "Do you mean we wouldn't have given you the strike vote?" Mr. Smith's response was, "That's exactly what I mean." We accept Mr. Smith's candid and credible evidence that those comments were merely his personal opinion. He was not a member of the bargaining committee and was not consulted by that committee (nor by any other Union official) regarding strategy. No such rationale was discussed at the provincial demand setting meeting, nor did any member of the bargaining committee or other Union official advise Mr. Smith of that rationale. Under the circumstances, Mr. Smith's statement, although understandably troubling to the complainants, does not by itself, or in combination with the other evidence adduced in these proceedings, establish a contravention of section 76 of the Act.

25. The Board has construed the duty of fair representation to include an obligation on the part of a trade union to fairly and honestly disclose, to the persons whom it represents, the terms of an employer's offer, when it elects to disclose the offer to them. See, for example, *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, at paragraphs 88 - 90:

88. A union's ability to decide when to disclose an offer to its membership is central to its effectiveness as a bargaining agent. It may decline to take an offer back for a vote of its members until it gets what it sees as an acceptable offer. That is, of course, subject to the option of the employer under section 40 of the Act, which can be exercised only once, to request a supervised vote of the employees on its last offer.

89. If a union has no positive duty to bring an offer back to the membership, it does have a duty of fair and honest disclosure when it does so. A union which falsifies or misrepresents an employer's offer violates its fundamental trust as the agent of the employees. Deliberate or reckless misrepresentations respecting the terms of an offer are inconsistent with the "good faith and honesty of purpose" inherent in the duty of fair representation. For example in *Diamond "Z" Association*, [1979] OLRB Rep. Oct. 791 the Board found that a union violated the standards of section 68 when it misrepresented to its members that a wage settlement would be retroactive and subsequently executed a collective agreement, without further notice to them, knowing it would not.

90. There are few reported cases in the U.S. dealing with the misrepresentation of facts in bar-

gaining by a union to the employees it represents. That is not surprising as it is fair to assume that the fundamental duty of a union to deal honestly with the employees it represents is so established that it seldom gives rise to litigation. In the limited number of cases where it has the Courts have left no room for doubt: knowing or deliberate misrepresentation by a union in statements made to employees or a failure to disclose critical facts is inconsistent with the duty to represent employees honestly and in good faith. (*Humphrey v. Moore* 55 LRRM 2031 (1964), U.S.S.Ct.); *Anderson v. United Paperworkers International Union* 103 LRRM 2803 (U.S. Dist. Ct. Minn.). In *Trail v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* 93 LRRM 3076 (1976, C.A. 6th Cir.) the Court ruled that a violation of the duty of fair representation would be established if the evidence confirmed allegations that the union deliberately withheld disclosure of contract terms from the employees affected because it had justifiable fear that they would be voted down.

In that case, the Board also indicated that where an employee asks his or her bargaining agent a specific question about the terms of an alternative offer, the union has a duty to answer openly and honestly.

26. It was not suggested in the instant case that the Union failed to fairly and honestly disclose the terms of the "offer last received", which was provided by the Council through the mediator on August 30, 1984. There was also no evidence of any misrepresentation by the Union with respect to the terms of the Council's subsequent offer of September 25, 1984, copies of which were provided by the Colleges to everyone in the bargaining unit.

27. It is unnecessary to detail all of the Union documents and oral statements by Union officials on which the complainants rely in support of their case. As might be expected, those documents and statements reflect partisan opinions and, accordingly, contain some emotional rhetoric and exaggerations. There is an element of "salesmanship" and propagandizing in many of those communications, somewhat akin to that which often obtains in union organizing drives. In recognition of the realities of collective bargaining (which is a process which often generates as much heat as it does light), and in recognition of the significant degree to which the personal opinions of collective bargaining participants may vary on such matters as the likelihood of a negotiated settlement, the likelihood or desirability of a strike, the usefulness of factfinding, the qualifications of a particular factfinder, the characterization of various acts or omissions of a mediator, and the reasonableness of various bargaining positions, this Board is no more inclined to monitor with microscopic precision communications between a union and bargaining unit employees in this context, than it is in the context of union organizing drives. The "line of regulation" which has been drawn between "salesmanship" and "improper conduct" in the latter context is that of "fundamental misrepresentation": see, for example, *Leon's Furniture Limited*, [1982] OLRB Rep. March 404, at paragraph 11. ("Coercion and intimidation" are also proscribed in that context.) In adopting that approach, the Board has expressly recognized that "the intricacies of collective bargaining can be difficult to explain", and that "the organizing process undoubtedly involves controversy and salesmanship" (see, for example paragraph 10 of that decision). The same is true of the process by which unions inform bargaining unit members about what has occurred at the bargaining table and what is expected to occur in the future. Thus, we are of the view that a similar approach is apt in the context of union communications with members of the bargaining unit with respect to such collective bargaining matters as the likelihood of a negotiated settlement, the likelihood or desirability of a strike, the usefulness of factfinding, the qualifications of a particular factfinder, the characterization of various acts or omissions of a mediator, and the reasonableness of various bargaining positions, to the extent to which such communications fall within the purview of section 76 of the Act. In this regard, we would note that it is not to be expected that all of the members of a bargaining committee, or others involved in the collective bargaining process, will share identical views on such matters, or convey identical information to members of the bargaining unit regarding them.

28. Having carefully reviewed and considered all of the written and oral communications which are impugned by the complainants in these proceedings, we have concluded that no fundamental misrepresentation has been established by the complainants, and that the evidence does not support the complainants' allegations that OPSEU has acted in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees.

29. The complaints also alleged that the Union contravened section 76 by "acting in an arbitrary manner which was discriminatory and in bad faith toward the Complainants through the manner in which it dealt with their concerns regarding the conduct of the negotiations by the Respondent's negotiations team." However, that allegation is not supported by the evidence.

30. For the foregoing reasons, having regard to the totality of the evidence and the submissions of the parties, the Board finds that no contravention of section 76 of the Act has been established. Accordingly, the complaint in File No. 1875-84-U is hereby dismissed. The complaints in File Nos. 2689-84-U and 0088-85-U are hereby adjourned *sine die* for a period not to exceed one year from the date of this decision. Unless a request that the Board proceed with one or both of those complaints is received by the Board from a party thereto within that period, they will also be dismissed.

DECISION OF BOARD MEMBER F. C. BURNET;

1. While I am in agreement with a number of interpretations and rulings set forth in the decision of my colleagues, I dissent in others, as set forth in the following.

2. I concur with the conclusion in paragraph 8 of the majority decision that the duty to bargain in good faith lies between the employer and the trade union and that the employees do not have status to challenge either of them on that score; and that the authority to enforce Section 5 of the *Colleges Collective Bargaining Act* lies with the Commission under that Act and not with this Board.

3. I am in accord with the view of the majority in paragraphs 9 and 10 that violation of a trade union's duty to bargain in good faith does not, as a matter of law, constitute a breach of its duty of fair representation; that facts which might lead to a finding that a union has breached its bargaining duty to an employer might also support a finding of breach of the fair representation duty to employees, but that, in that case, the issue would be whether the union has acted in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees, and not the issue of bad faith bargaining with the employer.

4. I also conclude with my colleagues that those actions of the union on which the complainants base their allegations, such as the high priority which the union accorded its workload proposal, the union's strict adherence to its bargaining timetable, its insistence on receiving a "last offer" at a time when items other than workload had been scarcely discussed, and its uncompromising attitude during mediation, are not inconsistent with the duty of fair representation and I would not sustain the charge on those grounds. However, I do not so believe in respect of the union's refusal to receive the employer's offer of September 25, and I conclude for reasons following that the refusal was arbitrary and constituted a dereliction of the union's duty in the representation of its members.

5. The facts are that on September 25, one week before the strike vote scheduled for October 2, the union refused to receive an employer offer from the mediator, who was then shuttling between the parties in an hotel in conventional mediation fashion. The union closed the door of its rooms to prevent entry of any employer representative who it was feared, might deliver an

offer. Similarly, the union executed a careful exit from the hotel in a manner to prevent any lurking employer representative from thrusting an offer into their unwilling hands. The apparent reason for this somewhat bizarre behaviour was that the union feared that such an offer would constitute an offer "last received" which under section 59(1)(d) of the Act would have to be submitted to an employee vote, and thereby disrupt the scheduled strike vote. (A vote on the employer's initial offer of August 30 had already been held on September 18.) It was also established in examination of union witnesses that the union refused to receive the September 25 offer without having had any prior intimation of its contents.

6. Jurisprudence on the fair representation issue has firmly established that falsification or misrepresentation of an employer's offer violates the union's fundamental trust as the agent of the employees and therefore violates the duty of fair representation. In my opinion, refusal to even receive an offer (which, incidentally, in this case did deal substantively with the issue of workload and salaries) is tantamount to denial that any offer was tendered, which clearly constitutes misrepresentation. By its action, the union deliberately placed itself in a position where it could not disclose to employees the true position of the employer. It sought a strike mandate from employees while suppressing information that is vital to any such employee decision, and which it is the primary obligation of the union to secure and provide.

7. That is not to say or imply that the union is obliged to endorse or publicize or justify any such offer. It may criticize, deride, condemn and recommend against it, and in most legislative jurisdictions it is not obliged to submit any or all offers to a vote. What it cannot do, without violation of its duty of fair representation, is to suppress such offer.

8. It may well be that the timing and content of an offer by either party may be tactically inconvenient or disadvantageous to the other, because of legislative requirements, seasonal considerations or other reasons, but that is not a valid basis for refusing to even receive an offer and pretending or maintaining to employees that the reality does not exist. In the instant case, the question as to whether it would or should trigger a vote is not before us and I make no judgment on that score, beyond noting that, if so, and if the union believes it cannot cope or is unfairly disadvantaged, the recourse lies in the legislative arena, and not in abrogation of the duty of fair representation.

9. Neither is it a defence to argue, as the union has, that the offer was publicized by the employer before the strike vote and that the employees were therefore well informed. That argument might be relevant to any assessment of damages that the complainants may have suffered through the union's misdemeanour, but not to the principle involved. The duty of fair representation lies with the union, and not the employer.

10. I concur that the evidence does not adequately support the complainants' allegation that the union conducted the 1984 negotiations with no intention of concluding a collective agreement, or that the union's communications with the membership were so deficient as to sustain the allegation in that respect.

11. I would accordingly sustain the complaint to the extent of declaring that the union violated its duty of fair representation by refusing to receive the employer's offer of September 25th.

2617-86-U; 2618-86-U Gregory Barrett, Complainant v. Blue Line Taxi Ltd., Respondent v. The Corporation of the City of Ottawa, Intervener

Change in Working Conditions - Parties - Unfair Labour Practice - Individual employee not having standing to allege breach of statutory freeze

BEFORE: *J. Harold Brown*, Q.C., Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *Gregory Barrett* for the complainant; *E. Rovet*, *W. French*, *R. Viau* and *J. Gitze* for the respondent; *Frank C. Askwith*, Q.C., for the intervener.

DECISION OF THE BOARD; April 27, 1987

1. These are complaints made pursuant to section 89 of the Labour Relations Act alleging a breach of section 79 of the Act.

2. Section 79 of the Act reads in part as follows:

(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

3. At the outset of the hearing, counsel for the complainant sought to have the complaints

of the complainant dismissed on the basis that the complainant lacks the legal standing to bring a complaint alleging a breach of the "statutory freeze" under section 79 of the Act.

4. No advance notice of the above jurisdictional issue was given prior to the hearing. The complainant advised the Board that he was taken by surprise and wished an adjournment to seek advice concerning his position.

5. In light of the above representations by the complainant, the Board granted the adjournment sought by him in both complaints. Counsel for the respondent was directed to submit his argument in writing in support of his challenge to the status of the complainant by no later than April 6, 1987. The complainant was to be provided with said argument and would have until no later than April 16, 1987 to reply thereto.

6. The argument of counsel for the respondent was received by the Board on April 2, 1987 and the reply of the complainant was received on April 15, 1987.

7. The material facts relevant to the complaints are as follows. There are two groups of taxi drivers in Ottawa. One group is known as single owner operators or single plate lessees. These drivers own their own plate or lease their plate from another person. The other group of taxi drivers are known as rental drivers. These drivers rent a vehicle and a taxi licence from a company like the respondent. The complainant falls into this category. On March 19, 1984, the Retail, Wholesale and Department Store Union applied to be certified for both groups of drivers of the respondent (and also two other companies which are not relevant for purposes of this proceeding). With respect to the rental drivers, a certificate was issued by the Board in the Spring of 1986. The Corporation of the City of Ottawa made an increase in the meter rates which applied among others to the respondent, effective December 1, 1985. The respondent, in turn, on or about the same date, increased the taxi rentals. It is this and other changes allegedly made by the respondent which are the subject matter of the instant complaints. All of these events took place prior to the Board issuing the certificate. Counsel for the Corporation of the City of Ottawa who appeared as an intervener at the hearing affirmed that the City had the authority to take the action which it did. We would note that the applicant claimed no remedy against the Corporation. No one appeared for the Retail, Wholesale and Department Store Union, nor did it file an intervention in these proceedings.

8. The Board has considered the submissions of counsel for the respondent and those of the applicant on the motion of the former that the complainant does not have jurisdiction to make the instant complaints alleging a breach of the "statutory freeze" by purportedly altering conditions of employment prohibited by the provisions of section 79 of the Act. Based on the language of section 79, we are satisfied that it is the sole right of the trade union and not the individual employees whom the trade union represents that can make a complaint under section 79. Stated another way, it is the rights of the trade union and not those of the individual employees *per se* that are protected by section 79 of the Act. The trade union may, for any number of reasons, give consent or withhold consent to changes in working conditions or deal with the matters in collective bargaining. It is clear from the language of the section, moreover, that the employer owes no duty to the employees, except as the duty is owed vicariously through the trade union. However, the scheme of section 79 of the Act does not lend itself to the concept that an employee can complain about changes in terms and conditions of work or, conversely, that an employer is required to obtain the approval of its employees before making changes in terms and conditions of employees. By analogy, our conclusion is supported by the decision of the Board in *Fanshawe College of Applied Arts and Technology*, [1980] OLRB Rep. Apr. 433, which held that an individual has no

standing to bring a complaint under the "freeze" provisions of the *Colleges Collective Bargaining Act*.

9. In the result, the instant complaints must be and are hereby dismissed.
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1669-84-R Labourers' International Union of North America, Local 1059, Applicant v. Brantco Construction, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Reconsideration - Applicant counsel arguing Board lacked jurisdiction to reconsider its decision to certify because others, including the Minister, had relied on the decision - Grounds raised by counsel going to discretion and not to jurisdiction to reconsider - Matter relisted for hearing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *David Strang*, *Jim MacKinnon*, *M. Reis*, *M. Clero* for the applicant; *Mark Conti-ni*, *Joe Graci* for the respondent; *Joe Freitas* for the objectors

DECISION OF THE BOARD; April 23, 1987

1. The matters herein arise out a Board decision to issue certificates to the applicant pursuant to section 144(2) of the *Labour Relations Act*. The certificates were issued as a result of an application for certification made by the applicant under section 144(1) of the Act. The application was disposed of by the Board without a hearing into it in accordance with the Board's discretion under section 102(14) of the Act. Two certificates were issued, one with respect to construction labourers employed by the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry in the province of Ontario, and the other with respect to construction labourers employed by the respondent in all other sectors of the construction industry in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, the Board's geographic area #3.

2. Some 15 months after the Board's decision issuing the certificates, the Board received a letter from Anthony Medeiros who purports to be an employee of the respondent affected by the application for certification. He claimed also to be writing on behalf of nine other persons whom he claimed were construction labourers employed by the respondent. As a result of that letter, the Board issued a decision listing these matters for hearing. At paragraph 8 of that decision, the Board commented as follows about the letter:

"It is implicit in the letter that there may be employees who should have received notice of the application for certification and did not. In these circumstances, the Board considers it appropriate to list this matter for hearing for the purpose of receiving the evidence and representations of the parties respecting whether there were employees who were entitled to notice that this application for certification who did not receive notice and, if there were, what effect that should have on the certificates which have been issued to the applicant."

3. When these matters came before the Board for hearing, applicant counsel took the position that the letter was a request for the Board to reconsider and revoke its decision by which the two certificates were issued to the applicant. Counsel moved as a preliminary matter to have that request dismissed without a hearing. The grounds argued by counsel for doing so were that the

Board either lacked jurisdiction to reconsider and vary or revoke its decision issuing two certificates to the applicant, or, if the Board had jurisdiction, it should exercise its discretion and refuse to reconsider, vary or revoke the certification decision. Counsel made extensive submissions in support of both elements of his motion. The Board does not intend to set them out in any detail here, but it is useful to list in point form the principal branches of his submissions.

4. In support of his claim that the Board lacks jurisdiction to reconsider its decision, counsel argued that:

- (1) The certificate with respect to the ICI sector is spent because, by operation of section 145(4) of the Act, the applicant and the respondent became bound to the labourers provincial agreement in effect at the time the certificate issued. Counsel relies on such Board decisions as *Falconbridge Nickel Mines Limited*, [1964] OLRB Rep. Dec. 440; *Chappels Limited*, [1974] OLRB Rep. Dec. 897; and *Arnprior and District Memorial Hospital*, [1981] OLRB Rep. Aug. 1089 and Oct. 1336, as standing for the proposition that once the parties become bound to a collective agreement, the Board has no jurisdiction to amend the bargaining unit description and, therefore, has no jurisdiction to reconsider its decision issuing a certificate for the bargaining unit.
- (2) The applicant has relied on the Board's non-ICI certificate to give notice to bargain and to apply for conciliation services.
- (3) The effect of the Board attempting to reconsider its decision issuing the non-ICI certificate would be to reconsider decisions of the Minister of Labour appointing a conciliation officer and deciding not to appoint a conciliation board with respect to the non-ICI negotiations. Since the Board has jurisdiction only to reconsider its own decisions and has no jurisdiction to reconsider the decisions of the Minister, the result of the Board attempting to reconsider its decision would be a nullity.
- (4) The person who brought the request was not entitled to do so because he was not an employee in either bargaining unit which the Board found to be appropriate, failed to appear at the hearing himself and made his request on the respondent's letterhead.
- (5) Furthermore, the person bringing the application is really acting for the respondent, who is not entitled to bring the request, and not for the employees.

5. Applicant counsel relies on the same grounds and on the additional ones set out below in support of his claim that, should the Board find it has jurisdiction to entertain a request for reconsideration, it should exercise its discretion to refuse the request.

- (1) Negotiations with respect to the non-ICI bargaining unit had reached the point at which legal sanctions could be applied by the parties by the time the Board received the letter referred to above. To revoke the Board's certificate in these circumstances would render the certification process ineffective.
- (2) For the Board to revoke its certificate would be to terminate the applicant's bargaining rights. The Board should not permit Section 106(1) of the Act, under which it gets its jurisdiction to reconsider its decisions, to be used for the same purpose as those sections of the Act which were designed to deal directly with the termination of bargaining rights.
- (3) For the Board to reconsider its decision in the circumstances giving rise to the request and because of the lapse of time between the issuing of the Board's certificates and the making of the request, would be to deny natural justice to the applicant.
- (4) Parties rely on the Board's certifications to take various actions and for this reason it is important that these decisions be final. For the Board to reconsider its decision in the circumstances of this case would be to undermine the finality of the Board's decisions.

6. Section 106(1) of the Act from which the Board derives its jurisdiction to reconsider its decisions states as follows:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The section is without limitation as to the type of decision which the Board can reconsider. The fact that others, including the Minister of Labour, may have relied on a Board decision does not deprive the Board of the jurisdiction which it otherwise has under the section. Were it not so, the Board would lose its ability, for example, to deal with a fraud discovered after certifying a trade union for a unit of employees in the ICI sector of the construction industry because of the effect of the section 145(4) of the act, or in other sectors of the construction industry, after a ministerial "no board" report had issued, if ministerial reliance on the Board's certificates were to deprive the Board of jurisdiction under section 106(1).

7. In the Board's view, all of the grounds raised by applicant counsel as to why the Board should refuse to reconsider and vary or revoke its decision are grounds which go to the exercise of the Board's discretion under section 106(1) of the Act and not to its jurisdiction to reconsider and vary or revoke its decisions. They are not matters which should be decided as part of a preliminary motion such as the one before the Board. They should be decided only after hearing and considering the evidence and representations of the parties with respect to the matters which were put on for hearing. That is the point at which the Board should decide the exercise of its discretion under section 106(1), having had full opportunity to weigh the merits of the respective positions of the parties. For these reasons, the Board will not refuse to exercise its discretion under section 106(1) of the Act to consider the matters put forward in Medeiros' letter.

8. In the result, the Registrar is directed to relist this matter for hearing on the earliest available date for the purpose of receiving the evidence and representations of the parties respecting whether there were employees who were entitled to notice of this application for certification who did not receive notice and, if there were, what effect that should have on the certificates which have been issued to the applicant.

2175-86-R Labourers' International Union of North America, Local 183, Applicant v. **Burl-Oak Paving Ltd.**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Working foreman not actively participating in petition's origination and circulation but signing it and present throughout process - Working foreman perceived as being managerial - Petition rejected - Applicant certified

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *C. A. Ballentine* and *D. A. MacDonald*.

APPEARANCES: *S.B.D. Wahl* and *J. Dias* for the applicant; *James G. Knight*, *Mr. C. Rowe* and *Mrs. H. Rowe* for the respondent; *Armando Cascao* and *Joao T. Cacador* for the objectors.

DECISION OF THE BOARD; April 1, 1987

1. This application for certification pursuant to the construction industry provisions of the *Labour Relations Act* originally came on for hearing before a differently constituted panel of the Board on December 12, 1986. At that time, the Board determined the unit of employees appropriate for collective bargaining and authorized a Labour Relations Officer to inquire into and report to the Board with respect to the duties and responsibilities of the five persons challenged by the applicant as not being properly included on the list of employees filed by the respondent.
2. Subsequently, the parties were able to resolve their differences with respect to the composition of the bargaining unit and the list of employees and the matter came back on for hearing on February 27, 1987.
3. In support of its application for certification, the applicant filed documentary evidence of membership on behalf of seven persons. This documentary evidence is in the form of membership cards, which include a combination application for membership and attached receipt. Each card contains an original signature and the receipts, which are countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made in respect of membership fees within the six month period immediately preceding the terminal date for the application. This documentary evidence is supported by a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency thereof. In short, the form and content of the membership evidence are consistent with the requirements of section 1(1)(l) of the Act.
4. The respondent filed a reply, a list of employees, and specimen signatures for the persons on that list as required by the Board's Rules of Procedure. The list of employees in the bargaining unit, as agreed to by the parties, contains twelve names.
5. Standing alone, the applicant's documentary evidence demonstrates that the union has a level of membership support well in excess of that required by section 144(2) of the Act for certification without the taking of a representation vote. However, a group of employees filed a "statement of desire" or "petition" (the terms are synonymous) signed by eight persons and indicating opposition to the certification of the applicant. All eight signatures on the petition are of bargaining unit employees and of these, seven had previously signed membership cards and paid \$1.00 in respect of membership in the applicant trade union with respect to this application. It is the signatures of the seven employees who first became members of the applicant and subsequently indicated what purports to be a change of heart by signing the petition which may be relevant to the Board's considerations. The sole issue in dispute between the parties when the matter came on for hearing on February 27, 1987 was the admissibility (the test of admissibility being "voluntariness") of the petition filed.
6. In certification proceedings, the object is to determine whether a majority of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their dealings with their employer. Pursuant to the *Labour Relations Act*, the certification of trade unions in this province, as in most Canadian jurisdictions, is based primarily upon an assessment of the trade union's support as demonstrated by the documentary evidence filed with respect to an application. The Board does not inquire into employee opinions of the virtues of trade union representation except as demonstrated by that documentary evidence which includes the trade union's membership records and any timely petitions filed in opposition to the application. The representation vote exists as a residual mechanism for ascertaining the wishes of bargaining unit employees in situations where either the applicant union

does not have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under subsection 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of the membership evidence as the means by which employee wishes with respect to certification are determined.

7. The realities of labour relations are such that employees can and do change their views as to the desirability of trade union representation. In recognition of this, the Board has developed a procedure which recognizes the validity of union membership cards but retains the flexibility to seek the confirmatory evidence of a representation vote where employees file a timely petition which indicates a voluntary change of heart. Unlike union membership evidence, petitions are not directly or precisely regulated by the Act. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement that the act of signing be confirmed either by monetary payment or otherwise. There is also no statutory declaration analogous to Form 9 or Form 80 (which attest to the regularity and sufficiency of the membership evidence). However, the existence of petitions is contemplated by subsections 103(2)(j) and 111(1) of the Act and Rule 73 of the Board's Rules of Procedure. The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petitions are voluntary and contain a sufficient number of signatures of persons who had previously signed union membership cards to create a doubt as to the sufficiency of the actual level of support enjoyed by the union. The Board must be satisfied that persons indicating an apparent change of heart did so voluntarily and without being motivated by an actual or perceived threat to their job security, a concern that the employer is involved in the petitions, or that failure to sign could result in reprisals. It is only those employees who first signed union membership cards and subsequently signed petitions whose signatures are relevant to the Board's considerations. This is because employees for whom no membership evidence is filed are treated as being opposed to the application. Consequently, the signature of a non-member on a petition can add nothing to the assessment of the support enjoyed by the union applying for certification.

8. It is well established that the employees objecting to certification bear the onus of establishing that their petition is voluntary. To do so, they must call witnesses to give evidence, based on personal knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which each signature was obtained. The cases are legion in which a failure to give satisfactory firsthand evidence regarding the origination and circulation of a petition has resulted in its rejection. Each and every signature on a petition must be identified and the circumstances under which it was obtained must be recounted by a person having personal knowledge thereof. Where such evidence is not presented, the signature may, and likely will, be discounted. In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be, managerial. Similarly, where managerial personnel or persons are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (Rule 73(5); *Radio Shack*, [1978] OLRB Rep. Nov. 1043; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676; *Skelhorns Bus Line Limited*, [1986] OLRB Rep. Oct. 1435).

9. Both of the employees who appeared at the hearing on behalf of the group of employee

objectors testified with respect to the petition. In assessing their evidence, the Board considered the consistency of their testimony, the apparent quality of their memory, their ability to resist the influence of self-interest, and their demeanour while on the witness stand. We were not impressed with the evidence of Mr. Cacador who testified first and in English. Though it was apparent that English is not his first language, the problems with and inconsistencies in his evidence arose, not from any difficulties in language or from nervousness, but rather from a lack of candour. In general, he was insolent and unresponsive to the questions asked of him. What evidence he did give regarding the origination and circulation of the petition is both internally inconsistent and improbable in the circumstances. We were more favourably impressed with the evidence of Mr. Cascao, but even his evidence was not credible on some material points.

10. Although the evidence reveals that there were some discussions about this application among bargaining unit employees prior to November 5, 1986, we know nothing of the nature of those discussions or what, if anything, else occurred prior to that date that might touch upon the origination of the petition. After work on November 5, 1986, however, five of the petitioners, including Messrs. Cacador, Cascao and Antonio Martins, the latter being the "working foreman", left for home together in a company-owned pick-up truck as they usually do. The route home apparently varies from day-to-day but Mr. Cascao is usually the first or second person to be dropped off. That particular evening, the employees stopped at Mr. Cascao's home first. Instead of continuing on their way to their respective homes as they usually do, the other four employees went into Mr. Cascao's home with him. They remained there for between half an hour and one and a half hours. Despite suggestions to the contrary, we find that the purpose of the meeting at Mr. Cascao's home was to discuss the signing of a petition in opposition to this application. It is clear that all five employees eventually agreed that if they could "get the other guys" to sign a petition, they would all sign the next day. Although Messrs. Cacador and Cascao were unable or unwilling to tell the Board what was discussed with respect to the petition prior to that decision being arrived at, we cannot believe that there were no other discussions about it at all and we find that such discussions were in the presence of, if not with the participation of, Antonio Martins. We also cannot accept Mr. Cacador's evidence that he had no idea which of the employees had previously signed applications for membership in the applicant, or Mr. Cascao's suggestion that he had only some idea. It is too much of a coincidence that only the employees who had earlier joined the union and Antonio Martins, the "working foreman" signed the petition and that only those eight and perhaps one other employee were even approached to sign it. Further, when asked why he sought the eight signatures that he obtained on the petition, Mr. Cascao himself stated that "if these eight were good enough to put it [the applicant] in, they were good enough to put it [the applicant] out". We find that Mr. Cacador, Mr. Cascao, and Mr. Martins all knew which employees had previously joined the applicant, and that those employees knew that they knew.

11. The following morning, Mr. Cascao went to the respondent company's "yard" with the petition, which had been written out the evening before by his girlfriend. In the yard, Mr. Cascao obtained all eight signatures, including his own, on the petition by approaching the employees individually, and after they, and he, had begun work. He approached the four employees who had been present at the meeting at his home the previous evening and three or perhaps four others who had not been there. On his evidence, all that was discussed with those latter employees at that time, and there being no prior conversations with them with respect to the petition, was whether or not the "other guys" had signed. Even if we accept, which we do not, that this was the only discussion that these persons were involved in prior to signing the petition, we are left wondering why these three or perhaps four would sign a petition for the sole reason that "the others", including Antonio Martins, had or intended to sign. There is no indication that Mr. Cascao made any attempt to conceal what he was doing during the minimum twenty minutes that it took him to

gather the signatures. After obtaining the signatures, he left the yard in a company truck with Mr. Martins and mailed the petition to the Board.

12. Antonio Martins is on the list of bargaining unit employees agreed to by the parties. As already indicated he is a working foreman. On the evidence, he gives the employees on the asphalt crew all of their day-to-day instruction and supervision, and is the direct and virtually only link with management for those employees. For example, he is the one who advises employees that they have been hired, the one who tells them their rate of pay, the one who discusses raises with them, the one to whom they go when seeking employment for acquaintances or relatives, and the one who calls the employees back from layoff. Further, he was identified throughout the evidence as the "foreman" and, when asked by counsel for the respondent if it was his "... understanding that a foreman can get someone in or out [of employment]", Mr. Cascao answered that "Yeah, and tells someone else what to do". Consequently, it is clear that, whether or not Antonio Martins is a managerial employee within the meaning of subsection 1(3)(b) of the Act, an issue which is not before us, he is clearly perceived by the other employees as having managerial influence and authority.

13. Antonio Martins was present throughout the origination and circulation of the petition. Even if he did not actively participate in its origination and circulation, which he probably did, he signed it and lent, and was seen by the other employees to lend, his support to it. We have no doubt that not only the two employees who signed the petition after he did, but all of the other employees who signed the petition, were aware of Mr. Martins' support for the petition and would reasonably believe that he would know whether or not they signed the document.

14. Non-working foremen are usually excluded from a construction industry bargaining unit. On the other hand, working foremen are generally included in such a unit unless they have some overall project responsibility or have the authority to affect a person's employment status. In many ways the positions of a "working foreman" is the construction industry equivalent to the industrial "lead hand". Because such employees generally have a special relationship with management, the Board will look carefully at any participation of a lead hand in the origination or circulation of a petition and has, in the past found petitions not to be voluntary on the basis of such participation (see for example, *General Crane Industries Limited*, [1974] OLRB Rep. Oct. 662; *Leamington Vegetable Growers' Co-operative Limited, Operating as G. Smith Produce Company*, [1974] OLRB Monthly Report June 402). As in the case of a lead hand, the involvement of a working foreman with a petition is of great concern to the Board, particularly in applications for certification. In *A. N. Shaw & Sons (Eastern) Ltd*, [1980] OLRB Rep. Oct. 1347, a working foreman originated and circulated a petition in support of an application to terminate a trade union's bargaining rights. In allowing the application and directing a representation vote, the Board contrasted the significance of the involvement of a working foreman with a petition filed in a termination application with the involvement of a working foreman with a petition in an application for certification as follows:

12. Before leaving this matter, we would note that this case differs in certain key respects from certification cases involving anti-union petitions. Here there has been no sudden and apparently inexplicable change of heart relating to union support on the part of employees who only a short time before had become union members. Further, the employees here have been represented by the union for some period of time and presumably they would have been aware of the union's ability to protect employees from being discriminated against for continuing to support the union.

15. In the result we are left with gaps in the evidence relating to the origination and circulation of the petition, particularly with respect to the discussions at Mr. Cascao's home on November 5, 1986 and those the following morning with the employees who had not been at that meeting. In

addition, we are unable to accept the suggestion that Antonio Martins is in the same position as any other bargaining unit employee. Whether or not he is in fact managerial, his supervisory functions as working foreman caused the other bargaining unit employees to perceive him as being managerial and his actual and perceived involvement with the petition raises concerns which would not exist if he was not a working foreman. It is because of the gaps in the evidence and the overall environment in the workplace due to Antonio Martins' involvement with a petition, that we are not satisfied that the petition is a voluntary expression of the true wishes of the employees who signed it. Accordingly, we find that it is not admissible as evidence relevant to the Board's assessment of the support enjoyed by the applicant during the material times.

16. On the basis of the evidence before the Board, we are satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 7, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

17. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of all employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 of the Board's decision dated December 23, 1986 in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman.

18. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and person above the rank of non-working foreman.

2914-86-R Labourers' International Union of North America, Applicant v. Dagmar Construction Limited, Respondent

Bargaining Unit - Construction Industry - Respondent asserting that applicant must, if it seeks ICI sector bargaining rights, also apply for non-ICI bargaining rights in relation to all Board areas in which the respondent has construction labourers in its employ - Board rejecting argument that applicant required to make its application with respect to more than one geographic area

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. Wilson* and *J. Redshaw*.

APPEARANCES: *David Strang*, *Nick Scibetta* and *Joseph Mancinelli* for the applicant; *Walter Thornton*, *G. J. Montgomery* and *Aldo Bigioni* for the respondent.

DECISION OF THE BOARD; April 21, 1987

1. The name of the respondent is amended to: "Dagmar Construction Limited".
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.
3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. The applicant trade union seeks to be certified to represent a bargaining unit of employees which it describes, in its application, as follows:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry of [sic] Ontario Labour Relations Board Area No. 5, save and except non-working foremen and persons above that rank.

5. At paragraph 8 of its Reply, the respondent describes the bargaining unit of its employees that it claims to be appropriate for collective bargaining as follows:

all construction labourers in the employ of the respondent in all sectors of the Construction Industry excluding the Industrial, Commercial and Institutional sector of OLRB Area #5 save and except non-working foremen and persons above the rank of non-working foreman.

At paragraph 13 of its Reply, the respondent explains why it takes that position:

The Respondent works as a road builder and bridge constructor. The Respondent's head office is located in Markham. The Respondent employs a substantial number of construction labourers who have extensive seniority with the Company in OLRB Area #8. The Company had two other projects under way in Board Area #8 on the day of the application. The Welland Canal project is a project of short duration and is the first project the Company has undertaken in OLRB Area #5. Therefore it is submitted that the bargaining unit described in the application is not appropriate and that Board Area 5 does not constitute "an appropriate geographic area" within the meaning of section 144(1) of the Act and that therefore an application for certification which includes the Industrial, Commercial and Institutional sector of the Construction Industry cannot be founded on employees working in Board Area 5.

6. At the hearing on March 13, 1987, counsel for the respondent reiterated the respondent's position as set out in its Reply. He asserted that the respondent generally employs a significant number of construction labourers in Board Area 8 and that, with respect to this particular application, the respondent employed nine construction labourers on the day prior to the date of application, seven construction labourers on the date of application, and nine construction labourers the day after the date of application in Board Area 8. Although he maintained that the respondent does, in his view, little or no industrial, commercial and institutional ("ICI") work, counsel asserted that any application for certification relating to construction labourers employed by the respondent in the ICI sector of the construction industry must include an application for all construction labourers in all other sectors of the construction industry in Board Area 8 as the companion "appropriate geographic area" contemplated by section 144(1) of the Act both as a general principle, and because Board Area 8 is where the respondent in this case, he asserts, does most of its work. It was counsel's position that where an employer has non-ICI construction employees in a number of Board Areas, a trade union seeking certification under section 144(1) of the Act must either apply for certification with respect to the construction employees in the trade it seeks to represent in each Board Area individually under subsection 3 or, if it seeks ICI sector bargaining unit rights for those employees, it must also apply under subsection 1 for certification of all such non-ICI employees in all Board Areas in which the respondent employer has such employees. He explained that the reason for this is to ensure that all employees who might in the future be affected by a certificate issued with respect to the ICI sector of the construction industry are given notice of and a right to participate in the certification proceedings. Counsel referred to the Board's in *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697.

7. Counsel for the applicant submitted that the application as filed meets the requirements of section 144(1) of the Act and that the Board should, as it has in the past, considered which employees were actually affected by the application when it was made and not speculate as to which employees may be affected in the future. Counsel referred the Board to a number of cases, including *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729; *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210 and *Louis W. Bray Construction Limited*, Board File No. 1729-86-R unreported decision dated October 24, 1986.

8. For reasons set out in *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999 and *Pelar Construction Ltd.*, *supra*, the Board has never attempted to make determinations concerning the sector in which employees are working when dealing with applications for certification under section 144(1) of the Act. Since *Colonist Homes Ltd.*, *supra*, the Board has interpreted the relationship of subsections 1 and 3 of section 144 as an option exercised by an applicant trade union; that is, the trade union decides which subsection it is applying under.

9. It was not suggested that there need be any employees actually working for the respondent in the ICI sector of the construction industry on the date of application in order for the application to properly relate to that sector, provided that the bargaining unit applied for encompasses other sectors of the construction industry in which the respondent did have employees on that date (see, *Colonist Homes Ltd.*, *supra*).

10. In *Watcon Inc.*, *supra*, the Board dealt with two separate applications for certification. In one, the United Brotherhood of Carpenters and Joiners of America, Local 785 applied, under section 144(1), for a bargaining unit of carpenters and carpenters' apprentices employed by the company in the ICI sector of the construction industry for the Province of Ontario and carpenters and carpenters' apprentices employed by the company in all sectors of the construction industry excluding the ICI sector in Board Areas 6 and 7. The respondent company asserted, as one of its arguments, that only Board Area 6 was an appropriate geographic because, although it did on the date of application employ carpenters in Board Area 7, it was based in and did most of its work in Board Area 6. The Board rejected that argument and found that all carpenters and carpenters' apprentices in the employ of the respondent company in the ICI sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices employed by the respondent company in all other sectors of the construction industry in both Board Areas 6 and 7, constitute a unit of employees appropriate for collective bargaining. In our view, the decision in *Watcon Inc.*, *supra*, stands only for the proposition that an application under section 144(1) of the Act *may* pertain to a bargaining unit that includes non-ICI sector employees in more than one geographic area. It does not suggest that there are circumstances under which such an application must pertain to more than one geographic area.

11. Paragraphs 6 and 7 of the decision *Louis W. Bray Construction Limited*, *supra*, set out the issue before the Board in that case:

6. Having regard to the agreement of the parties, the Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. This application was made September 15, 1986, and on that date the respondent was employing construction labourers on three projects. None of the projects were in the industrial, commercial and institutional ("ICI") sector of the construction industry. One project was in the Board's geographic area #15, that is, the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell. The other two projects were outside of Board area #15. There was no dispute between the parties that construction labourers working on the project within Board area #15 were included in the bargaining unit described above. The parties were in dispute as to whether the construction labourers employed on the other two projects on the date of the application were to be included in the unit. It was the respondent's position, that, since the application was made under section 144(1) of the Act at a time when there were no construction labourers employed by the respondent in the ICI sector, all of the construction labourers employed by the respondent on September 15th should be included in the unit described above. According to the respondent, this is because these construction labourers could be employed in the future by the respondent in the ICI sector. Therefore, they are construction labourers who, in the words of section 144(1) "... would be bound by a provincial agreement ...".

In that case the Board rejected the respondent's contention. The issue before the Board in that case was not identical to that before the Board in this one because it was not suggested in *Louis W. Bray Construction Limited* that the trade union had to apply for a bargaining unit that included all

non-ICI sector employees of the respondent employer, only that all such employees were entitled to participate in a representation vote with respect the application that had been made. However, neither was the position put forward by the respondent in *Louis W. Bray Construction Limited* case entirely unlike the one the Board is urged to adopt in this case; that is, that the non-ICI sector construction employees outside of the Board area applied for as part of this application for certification under section 144(1) of the Act should be included in the bargaining unit applied for purposes of the count (and presumably for all other purposes relating to the application) because they might, at some time in the future, be employed by the respondent in the ICI sector and be bound, if the application succeeds, by a provincial collective agreement. In essence, the respondent to this application takes the position taken by the respondent in *Louis W. Bray Construction Limited* one step further when it asserts that the applicant must, if it seeks ICI sector bargaining rights, also apply for non-ICI bargaining rights in relation to all Board areas in which the respondent has construction labourers in its employ. The Board in *Louis W. Bray Construction Limited*, correctly in our view, rejected the respondent employer's position. Similarly, the position of the respondent in this proceeding must also be rejected.

12. Section 144(1) of the Act requires only that an application for certification relating to the ICI sector of the construction industry be for a bargaining unit consisting of all employees who could be bound by a provincial agreement together with all other unrepresented employees in at least one appropriate geographic area. In our view, the language of section 144(1) contemplates that an employer in the construction industry may have unrepresented construction employees in other than the ICI sector of the construction industry in more than one geographic area. The words "in at least one appropriate geographic area" permit a trade union to make its application with respect to more than one geographic area. They do not, in our view, require the trade union to do so. Furthermore, in determining the unit of employees that is appropriate for collective bargaining, and ascertaining the number of employees in that bargaining unit at the time the application was made and the level of support in the unit for the trade union's application for certification, the Board has developed practices and procedures that recognize that the make up of any given employer's employee complement rarely remains constant. Even in non-construction businesses employees may be continually coming and going as a result of hiring, firing, lay-offs, leaves of absence, and so on. The nature of the construction industry is such that employment with a particular employer tends to be even more ephemeral. In the face of this labour relations reality, the Board must, under section 7(1) of the Act, ascertain the number of employees in the bargaining unit and the number of such employees who are members of the applicant trade union at particular times. In addition, section 119(2) of the Act specifies that, in applications for certification under the construction industry provisions of the Act, the Board need not have regard to any increase in the number of employees in a bargaining unit after the application was made. The rule adopted by the Board in the construction industry is that persons who are not both employed by and at work for the respondent employer on the date the application is made are not included as employees in the bargaining unit for purposes of "the count" even though their absence on the date of application was due to uncontrollable circumstances (see for example, *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. Mar. 521; *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41). The requirements of the Act and the ephemeral nature of employment in the construction industry are such that it is neither possible nor practical for the Board to speculate about what persons may at some unspecified time in the future be affected by a successful application for certification. Accordingly, the applicant in this case is not required to make its application in relation to Board Area 8.

13. The Board ruled as aforesaid orally, without reasons, at the hearing on March 13, 1987. The Board further found and hereby confirms that, pursuant to section 144 of the Act, all construction labourers in the employ of the respondent in the industrial, commercial and institutional

sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors on the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Halton and Norfolk coming within the former County of Haldimand, save and except non-working foremen, and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The respondent filed, together with its Reply, a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. The list as filed contained ten names. The applicant challenged the inclusion of Veronica Hall on the list and the respondent agreed that her name ought not to be on it. Having regard to the agreement of the parties, we find that Veronica Hall is excluded from the bargaining unit for purposes of the count. At the hearing, the applicant also challenged the inclusion of Frank Esposito, Tony Fanone, Dominic Farina and Angelo Savoia on the list of employees. By letter dated March 19, 1987, the applicant particularized its challenges in respect of those four individuals as follows:

3. The Applicant challenges the inclusion of Frank Esposito, Tony Fanone, Dominic Farnia and Angelo Savoia on the list of employees in the bargaining unit, in that, while the aforesaid employees were employed by the Respondent within Board Area 5 and may have worked in that area on the date of application, these persons were not employed as construction labourers nor did they perform the work of construction labourers for the majority of their time on the date of application.

4. Further and in the alternative Angelo Savoia was the job superintendent at the project in question and as such did not perform sufficient labourers work to bring him within the unit and in any event ought to be excluded pursuant to section 1(3)(b) of the Act.

5. Without limiting the generality of the foregoing, Frank Esposito, Tony Fanone, and Dominic Farina appear to have been employed as equipment operators, truck drivers or pipefitters or in a combination of those classifications.

15. The Board therefore authorizes a Labour Relations Officer, to be designated by the Registrar, to inquire into and report to the Board with respect to the duties and responsibilities of, and the nature of the work performed by, Frank Esposito, Tony Fanone, Dominic Farina, and Angelo Savoia on the date of this application. The attention of the Officer and of the parties is directed to the Board's decisions in *E & E Seegmiller Limited*, *supra*, and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 with respect to the criteria to be used in determining whether or not a particular individual is to be included in the construction industry bargaining unit for purposes of the count.

16. The matter is referred to the Registrar.

3347-86-M Canadian Paperworkers Union, Applicant v. Domtar Inc., Respondent

Parties - Right of Access - Raiding union seeking access order - Incumbent union seeking to intervene to oppose order - Access order not infringing any legal rights or interests of incumbent union - Intervener status denied

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

APPEARANCES: *Brian Switzman*, *Cecil Makowski* and *Elvan Bishop* for the applicant; *H. R. Dyer*, *Dexter Adams* and *Louis Joubert* for the respondent; *L. C. Arnold* and *Eric Hautella* for Lumber and Sawmill Workers Union Local 2693.

DECISION OF THE BOARD; April 9, 1987

I

1. This is an application under section 11 of the *Labour Relations Act*. It is one of two similar applications which came before the Board for hearing on April 6, 1987. (The other is Board File No. 3348-86-M, involving Abitibi-Price Inc.). In each case the Canadian Paperworkers Union ("CPU") seeks a direction from the Board allowing access to the employer's property for the purpose of attempting to persuade its employees to join the CPU. In each case, Lumber and Sawmill Workers Union Local 2693 ("Local 2693") sought to intervene for the purpose of opposing the access order. In the Abitibi-Price case, the employer was content to grant access so long as the CPU representatives advised the company in advance of their intended visit and abided by the posted safety rules. In that application only Local 2693 was opposed to the access order sought. In the Domtar Inc. application, both Domtar and Local 2693 have indicated that they intend to oppose any access order. They say, such order is unnecessary. Section 11 reads as follows:

Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

2. In this decision we propose to deal with only two issues:

- (1) whether the Domtar case should be adjourned until April 13, 1987 for a consideration on the merits;
- (2) whether Local 2693 has the status to intervene in either proceeding.

3. The first question in our view is relatively easy. We were advised that there was currently pending before the Board another application for access made by the International Woodworkers of America ("IWA") which is scheduled for hearing before the Board on April 13, 1987. It appears that the IWA is another rival suitor seeking to displace the incumbent Local 2693. Domtar reserved its position with respect to the actual necessity of *any* access order, but argued that if two "raiding unions" were both seeking access, on terms, the two applications should be heard together to avoid any possibility of inconsistent results.

4. We are inclined to agree with Domtar's assessment of the situation - particularly where, as here, the delay involved amounts to only one week. Counsel for Domtar assured the Board that the critical facts in the case were not really in dispute. The problem, he agreed, was the inference

to be drawn from those facts and whether an access order should be granted. In his submission, the matter could be comfortably concluded on April 13, 1987, so there was little or no prejudice to the CPU. In our opinion, in the circumstances, the CPU and IWA applications really should be heard together. Accordingly, this application will be adjourned to April 13, 1987.

5. Local 2693's request to intervene is a separate issue to which we now turn.

6. As we have already noted, Local 2693 is the current bargaining agent for the employees whom the CPU seeks to organize and is a party to a collective agreement with Domtar which expires on August 31, 1987. Local 2693 argues that section 11 was not intended to facilitate "raids", and since any access order would necessarily assist the CPU in its efforts to organize employees currently represented by Local 2693, the latter union has a right to intervene to oppose the granting of such order. Counsel submits that even if an order were to be granted, he would have submissions to make about its form and the posting requirements, lest the CPU be given "unfair advantage" in the coming contest. Counsel expressed concern that any access order granted by the Board could be misconstrued or misrepresented as the Board's endorsement of the CPU's organizing campaign. This argument is plausible and attractive but, on balance, we do not think it should prevail.

II

7. The purpose of the Act is to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions *as the freely designated representatives of employees*. Under section 3 of the Act, every person is free to join a trade union of his own choice and to participate in its lawful activities. However, collective bargaining cannot become a practical reality unless employees are exposed to the debate about the pros and cons of trade unions, or a particular union.

8. The freedom to join a trade union (or, as in this case, change unions) may be seriously impeded where the employees not only work but also reside on the property of their employer. In those circumstances, absent a direction of the kind envisaged by section 11, the employer would have the right to control access to the employees even on non-working time. Any union organizer who entered onto the employer's property without permission, would run the risk of being charged with trespass (see *R. v. Labelle* (1965), 48 D.L.R. (2d) 37, 65 CLLC ¶14,056). But in a system based upon membership cards signed by the employees, such contact is imperative if a certification application is to be successfully launched. That is why what is now section 11 of the Act was added in 1970 to remove this impediment. To this extent, a Board direction under section 11 does limit or modify the employer's pre-existing property rights. However, that does not mean that it infringes upon any *legal right* or interest of an incumbent trade union.

9. There is nothing on the face of section 11 which suggests that it should not apply to "raids", in which one union is seeking to displace another. Quite the contrary. The Legislature has expressly contemplated the possibility of displacing an incumbent union, and has merely limited the time for doing so to the "open period" in the collective agreement. (See sections 5 and 61 of the Act.) Apart from that, it is left to the employees to determine whether they wish to be represented or by whom. There is no reason to limit the meaning of the term "trade union" in section 11 or to give it other than its ordinary meaning: any organization which meets the requirement of section 1(1)(p) of the Act. The right of access is just as important in a raid situation as in the case of an unorganized group of employees - indeed, perhaps even more important because the incumbent will already have an established presence and access must be available so that a rival can orchestrate its organizing campaign to capitalize on the limited window of opportunity presented by the "open period". If another union seeks to present itself as a plausible alternative, it will require

contact with the employees in order to make its case. Anything which delays or impedes access to the employees for the purpose of signing membership cards may limit their right to be represented by the union of their choice; and section 11 makes it abundantly clear that such contact should not be limited solely because the employer controls access to the premises on which the employees reside.

10. Obviously any *direction to the company* granting access to its property will have an incidental tactical effect on Local 2693. However we are not persuaded that the incumbent's *legal rights* (as opposed to those of the company) would be affected in any way. The CPU is not seeking here anything significantly different from the direction already granted in the case involving Abitibi-Price. The CPU merely wants a better opportunity to speak to Domtar's employees. Local 2693 remains the employees' bargaining agent with all rights, privileges and duties associated with that status. Local 2693 continues to have any rights accorded to it under the collective agreement. Its rights under the Act are not impeded in any way. Should a certification application be made, it would have the right to intervene in opposition, and if a representation vote were held, it would appear on the ballot. Nothing in a Board direction granting access to representatives of the CPU (typically on terms such as that they give the employer notice in advance, abide by any camp safety rules etc.) would restrict an incumbent's right to campaign. Nothing in a Board direction would alter the incumbent's pre-existing right to communicate with its members. And nothing in such Board direction to the employer would impinge upon the rights of the incumbent's members. The only effect on them - and again it is incidental - is that they may be more exposed, for a time, to a certain amount of salesmanship which they are quite capable of assessing and rejecting if that is their wish. We simply fail to see how the concerns articulated by Local 2693 amount to a legal foundation for intervention, even if it has an "interest" in a general sense.

11. For the foregoing reasons, the Board is of the view that the incumbent union has no right to intervene in these proceedings because, in our view, none of its legal rights are or can be detrimentally affected by the order sought by the applicant.

12. The merits of the CPU's application will be considered on April 13, 1987.

2712-85-JD Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association Local Union No. 30, Complainants v. The Electrical Power Systems Construction Association, Ontario Hydro, International Association of Bridge, Structural and Ornamental Ironworkers Local 721 and International Brotherhood of Boilermakers Local 128, Respondents

Jurisdictional Dispute - Collective agreements requiring work assignment disputes be referred to a common tribunal - Respondents contending Board having no jurisdiction to entertain complaint - Whether clauses in agreements rendered nugatory when disputes tribunal ceased to exist - Board concluding it has no jurisdiction to entertain complaint

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members D. A. MacDonald and R. R. Montague.

APPEARANCES: Stanley Simpson, A. Budway and F. Campbell for the complainant; A. J. Ahee

for Ironworkers Local 721 and Boilermakers Local 128; *Robert W. Little, Yvars Staarst and Elton Eshpeter* for the Electrical Power Systems Construction Association and Ontario Hydro.

DECISION OF THE BOARD; April 10, 1987

1. This is a complaint concerning a work assignment dispute filed under section 91 of the *Labour Relations Act*. The respondents contend that subsection 14 of section 91 deprives the Board of jurisdiction to entertain the complaint. They claim that the complainants and the respondents are bound to collective agreements which require them to refer work assignment disputes to a common tribunal within the meaning of subsection 14. The complainants, not surprisingly, take the position that they are not bound to such provision in their collective agreement. For ease of reference, hereinafter the Board will refer to the complainants, Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association Local Union No. 30 as "the Conference" and "the Sheet Metal Workers" respectively. It will also refer to the respondents The Electrical Power Systems Construction Association as "EPSCA", Ontario Hydro as "Hydro", the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 as "the Ironworkers" and the International Brotherhood of Boilermakers Local 128 as "the Boilermakers".

2. Subsection 14 of section 91 provides as follows:

The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

3. Hydro is bound to collective agreements between EPSCA and the trade union parties to the complaint. Those agreements contain the following clauses which are relevant to the issue of the Board's jurisdiction:

SHEET METAL WORKERS

Article 8

WORK ASSIGNMENT

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8.3

The Employer who has the responsibility for the installation shall make a proposed assignment of the work involved. The Employer will specify a time limit for the Unions involved to submit evidence of their claims. The Employer will evaluate all evidence submitted as per article 8.1 and make a final assignment of the work involved. This final assignment will be in accordance with the procedural rules established by the Impartial Jurisdictional Disputes Board. The Employer will advise the Union of the final assignment prior to work commencing. A copy of such assignments shall be submitted to the Business Manager of the Ontario Sheet Metal Workers' Conference.

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8.5

In the event that a jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the International Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the International Unions involved, it shall then be submitted to the Impartial Jurisdictional Disputes Board for the Construction Industry for resolution. The Business Manager of the Ontario Sheet Metal Workers' Conference will advise EPSCA in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding to the parties to this Agreement.

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8.7

In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment being referred to the IJDB, EPSCA and/or the Union shall have recourse to the Ontario Labour Relations Board for a decision.

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IRONWORKERS

Article 6

WORK ASSIGNMENT

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6.2

The Employer who has the responsibility for the performance and installation shall make a proposed assignment of the work involved. The Employer shall be responsible for providing copies of proposed assignments to all Unions in attendance at the mark-up meeting. The Employer will specify a time limit for the Unions involved to submit evidence of their claims. The Employer will evaluate all evidence submitted and make a final assignment of the work involved. This final assignment will be in accordance with the procedural rules established by the Impartial Jurisdictional Disputes Board. The Employer will advise the Unions of the final assignment prior to work commencing.

• • •

6.3

In the event of a jurisdictional dispute, the Employer will make an assignment for the work in dispute in accordance with the Procedural Rules and Regulations of the Impartial Jurisdictional Disputes Board. If the jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the International Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. The parties will settle such jurisdictional dispute in accordance with procedure as outlined by the Impartial Jurisdictional Disputes Board for the Construction Industry of the Building Trades Department, AFL-CIO or any successor agency of the Impartial Jurisdictional Disputes Board authorized by the Building Trades Department.

6.4

In the event the dispute is not settled by the International Unions involved, it shall then be sub-

mitted to the Impartial Jurisdictional Disputes Board for the Construction Industry for resolution. The Union and Employer involved shall advise EPSCA respectively, in writing, of an intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding on the parties to this Agreement.

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6.6

In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment being referred to the Impartial Jurisdictional Disputes Board, EPSCA shall have recourse to the Ontario Labour Relations Board for a decision.

BOILERMAKERS

Article 6

WORK ASSIGNMENT

• • •

6.2

In recognition of the Union's jurisdictional claims, it is understood that the assignment of work and the settlement of jurisdictional disputes with other Building Trades organizations shall be adjusted in accordance with the procedure established by the Impartial Jurisdictional Disputes Board, or any successor agency of the Building and Construction Trades Department....

6.3

When there is a dispute as a result of a pre-job mark-up, the Employer will make an assignment only after:

- (a) evidence has been submitted by the unions involved within a time limit specified by the Employer;
- (b) all evidence submitted has been evaluated by the Employer.

A copy of such assignments shall be submitted to the Boilermaker Union office and Accredited Union Representative.

6.4

The International Representative of the Union will advise the Association in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question. The decision of the Impartial Jurisdictional Disputes board will be final and binding to the parties to this Agreement.

• • •

6.6

In the event that the Impartial Jurisdictional Disputes Board for the Construction industry fails to render a decision within sixty (60) days of the disputed assignment or if the said Disputes

Board is unable to convene and issue decisions, the Association and the Union shall have recourse to the Ontario Labour Relations Board for a decision.

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4. The Sheet Metal Workers takes the position that its collective agreement with EPSCA does not contain, to quote the words of section 91(14) of the Act, "...a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement,...". It bases its stand on the admitted fact that the Impartial Jurisdictional Disputes Board ("the IJDB") ceased to exist after the coming into effect of the collective agreement. Therefore, clause 8.5 of the agreement has been rendered nugatory and does not operate to deprive the Board of jurisdiction pursuant to section 91(14). Should the Board find that the collective agreement does operate to deprive it of jurisdiction pursuant to section 91(14), it is the Sheet Metal Workers' alternate position that, on the facts of this case, it is entitled to rely on clause 8.7 of the agreement to have recourse to the Ontario Labour Relations Board for a decision.

5. It is common ground amongst the parties that the IJDB has not existed since June 1, 1984. It had existed pursuant to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry which most recently became effective June 1, 1977. Hereinafter, the Board will refer to that plan as "the Predecessor Plan". It was succeeded by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry which became effective June 1, 1984, and to which the Board will hereinafter refer as "the Plan". There is no evidence before the Board that, at all times material to this complaint, the Plan has ceased to operate. The IJDB and its chairman were responsible under the Predecessor Plan for its administration and part of that responsibility was for the IJDB to decide work assignment disputes by making what have become known in the industry as "job decisions". In general terms, job decisions were decisions which applied only to the project on which the dispute arose and in which the IJDB would award the work to one of the disputing trade unions. The decisions normally were made without lengthy hearings and were based on submissions, largely in written form, made to the IJDB by the parent International Unions of the disputing local trade unions. There is little doubt that the parties who subscribed to the Predecessor Plan considered job decisions to be the most important aspect of the plan and the most important function of the IJDB respecting the resolution of work assignment disputes. But, as the Board noted in its decision in *Stoney Creek Mechanical Limited*, [1982] OLRB Rep. Dec. 1917, at paragraph 19, besides providing for job decisions to be made by the IJDB, there were many other provisions of the Predecessor Plan which made an "...important contribution to the avoidance of work disruption over work assignment disputes". After noting that the IJDB had stopped making job decisions, the Board observed that the rest of the plan and its procedural rules and regulations were still in force and the IJDB was still making procedural rulings. It then went on to identify some of the elements of the plan which were still contributing to the avoidance of work disruption, commenting as follows:

19....The procedural rulings are a significant part of that contribution. The plan specifically provides that there shall be no strikes or work stoppages arising out of any jurisdictional disputes (Article VII, section 1). The agreements and decisions of record as to work jurisdiction claims of the BCTD's constituent unions are effectively made part of the Plan and unions are required to honour them and are subject to penalties for failing to do so. (Article VII, sections 1 and 2). Employers and unions are prohibited from attempting to establish any jurisdiction which deviates from the spirit and intent of the Plan and its Rules (Article VII, section 5). Employers are obligated to assign work in accordance with the Rules and the IJDB is empowered to take procedural or legal action against employers who make continued misassignments (Article VIII, section 1(b)). Employers also have a responsibility under the Plan to use their best efforts to have their subcontractors comply with the terms of the Plan. (Article VIII, section 1(e)).

Employers and unions alike are obligated to resolve work assignment disputes in accordance with the Rules. (Article VIII, section 2(a)).

6. The Plan retains all of those elements, but the IJDB has been replaced. Its administrative tasks have been given to an Administrator in the person of Dale Witcraft who had been the chairman of the IJDB. The IJDB's function of making job decisions has been replaced by a provision for submitting work assignment disputes to final and binding arbitration by a single arbitrator. It is an expedited process available to any of the parties affected by a dispute and is triggered by filing notice of the dispute with the Administrator pursuant to Article V of the Plan and Article IV of the Procedural Rules and Regulations for the Plan ("the Rules"). It may be seen from those articles that the referral of a dispute to arbitration is triggered by the filing of notice of the dispute with the Administrator. It is unnecessary for the purpose of this decision to examine the procedure in detail at this point, or for that matter, to analyze the Plan in any detail. Suffice to say, except for the changes in wording which had to be made in order to accommodate the substitution of the Administrator and the arbitration process for the IJDB, much of the wording of the Predecessor Plan can be found in the Plan. For example, the obligations which the parties to the Plan and the employers and trade unions bound by it have under the Plan are identical to those which they had under the Predecessor Plan.

7. The collective agreements of the trade union parties to this complaint which are binding on Hydro require disputes over work assignments to be referred to the IJDB. The same was true of the collective agreements involved in the *Stoney Creek* decision, *supra*, and in the other decisions of the Board which preceded it referred to *infra*, in which the Board found that it was deprived of jurisdiction by section 91(14) of the Act to entertain the work assignment complaints. The only way in which the parties to those collective agreements could have access to the IJDB was through the Predecessor Plan from which it drew its very existence. The IJDB had no life separate from that plan. Before a party could access the IJDB, it had to be stipulated to the Predecessor Plan and had to follow its Procedural Rules and Regulations. They required that certain preliminary steps be taken by representatives of the trade unions involved to attempt to resolve the dispute. If those steps were not successful, any of the parties affected by the dispute could request the IJDB to make a job decision. Thus, when a trade union, a council of trade unions, an employer or an employer's organization were agreeing to take work assignment disputes to the IJDB, they were in fact agreeing to take the disputes to the Predecessor Plan. To put it another way, using the name Impartial Jurisdictional Disputes Board was just a shorthand way of referring to the Plan for Settlement of Jurisdiction Disputes in the Construction Industry and to its Procedural Rules and Regulations.

8. This becomes evident from Board decisions like *Stoney Creek*, *supra*. That decision discusses the Predecessor Plan at some length in the course of the Board deciding whether section 91(14) of the Act had been rendered nugatory by the fact that the IJDB had ceased making job decisions and had been found by the National Labour Relations Board to no longer be able to police and administer its own awards. See, for example, the Board's references to the Predecessor Plan or its Rules at paragraphs 1, 8, 9, 19, 20 and 21, and at paragraphs 5 and 7 to comments made by IJDB Chairman Witcraft, as he was then, in his letters or telexes quoted in those paragraphs. The same impression is conveyed by Board decisions made prior to *Stoney Creek*, *supra* in which the Board found it was deprived of jurisdiction under section 91(14). In this respect, see generally: *Ontario Hydro*, [1979] OLRB Rep. Feb. 124, at para. 5; *Ontario Hydro*, [1982] OLRB Rep. Feb. 248, paragraphs 5, 9 and 10; *Dominion Bridge Company Ltd.*, [1982] OLRB Rep. May 667, at para. 5; *Comstock International Limited*, [1982] OLRB Rep. June 854, at para. 6; *Ontario Hydro*, [1982] OLRB Rep. July 1048, para. 9; and *Jervis B. Webb Company of Canada, Ltd.*, [1983] OLRB Rep. Sept. 1484, at para. 5.

9. In the Board's view, therefore, when the parties to the Sheet Metal Workers' collective agreement agreed in clause 8.3 that final assignments by the employer who has responsibility for the installation "...will be in accordance with the procedural rules established by the Impartial Jurisdictional Disputes Board.", and in clause 8.5 that unresolved work assignment disputes "...shall then be submitted to the Impartial Jurisdiction Disputes Board...for resolution.", they were agreeing to follow the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry and its Procedural Rules and Regulations which were in effect at the time they entered into the collective agreement. That was the Predecessor Plan and its Procedural Rules and Regulations. The Plan is the continuation of the Predecessor Plan in an amended form. There was no hiatus between the expiry of the Predecessor Plan and the commencement of the Plan. Important articles from the Predecessor Plan and from its Procedural Rules and Regulations have been retained in the new Plan and its Rules, unchanged except to the extent required by the substitution of the Administrator and the arbitration process for the IJDB as mentioned above. A specific example is found in Article I of the Procedural Rules and Regulations for the Plan. It is titled "Contractor's Responsibility". Clause 2 of the article states as follows:

When a contractor has made an assignment of work, he shall continue the assignment without alteration unless otherwise directed by an arbitrator or there is agreement between the National or International Unions involved.

Clause 3 of "Contractor's Responsibility" in the Procedural Rules and Regulations of the Predecessor Plan as quoted in *Stoney Creek, supra*, says:

When a contractor has made an assignment of work, he shall continue the assignment without alteration unless otherwise directed by [the IJDB] or by the agreement between the International Unions involved.

Other than the addition of the word "National" to describe the unions involved, the only difference between the two clauses is that the Plan refers to "an arbitrator" where the Predecessor Plan refers to the IJDB.

10. The evidence before the Board is that the Sheet Metal Workers and EPSCA are stipulated to the Plan quite apart from any affect that Clause 8.5 of their agreement might have in binding them to the Plan. EPSCA's stipulation to the Plan is binding also on its members who are employers under the Sheet Metal Workers' collective agreement, and this includes Hydro. Clause 8.5 of the Sheet Metal Workers' collective agreement with EPSCA and the related clauses quoted above from Article 8 of that Agreement are clauses designed to deal with a particular kind of dispute, that is, a work assignment dispute. In the Board's view, clauses in collective agreements dealing with disputes resolution should not be read narrowly. For the reasons stated above, the Board is satisfied that when the Conference and EPSCA agreed in Clause 8.5 that work assignment disputes not settled by the International Unions involved shall be submitted to the IJDB for resolution, they were agreeing that these disputes were to be resolved under the terms of the Predecessor Plan. Therefore, their commitment to refer work assignment disputes to the IJDB in Clause 8.5 was a commitment to refer them to the processes of the plan from which the IJDB got its authority. That plan, in an amended form, remains in effect and, pursuant to clause 8.5 of the Sheet Metal Workers' agreement, continues to obligate the parties bound by that agreement to refer work assignment disputes to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry.

11. The provisions for referring a work assignment dispute to the IJDB are the same in EPSCA's collective agreements with the Ironworkers and the Boilermakers as they are in the Sheet Metal Workers' agreement. For the same reasons, therefore, the Board finds that EPSCA,

the Ironworkers and the Boilermakers have agreed to refer work assignment disputes to the Plan for final and binding resolution.

12. The Board has interpreted the words “collective agreement” in section 91(14) of the Act to include the plural “collective agreements” in order for the section to give effect to the multi-party nature of jurisdictional disputes and in order for section 91(14) to give effect to the option of employers and trade unions to make private arrangements for the settlement of work assignment disputes. See the Board’s decision in *Adam Clark Company Ltd.*, 76 CLLC ¶16,053. The Board’s interpretation of section 91(14) given in the *Adam Clark* decision, *supra*, and its analysis therein of the reasoning in other Board decisions make it clear that the meaning applied by the Board to the phrase “...that can be resolved under the collective agreement,...” in section 91(14) is that the agreements of all parties to the dispute must provide the same method of resolving the dispute. Since the Board has found that all of the parties to this complaint have subscribed to the processes of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry for final and binding resolution of work assignment disputes, the Board finds that their collective agreements contain a provision requiring the reference of any difference between them arising out of a work assignment to a tribunal mutually selected by them. In the result, section 91(14) of the Act deprives the Board of jurisdiction to hear this complaint unless Clause 8.7 of the Sheet Metal Workers’ agreement gives the Sheet Metal Workers recourse to the Ontario Labour Relations Board for a decision.

13. That brings the Board to the complainants’ alternate position which is that the dispute was referred to the Administrator of the Plan for a decision and the Administrator has failed to render a decision within sixty days of that referral. In this respect it is interesting to note that, while the Sheet Metal Workers on one hand have taken a position that they are not bound to the Plan by Clause 8.5 of their agreement with EPSCA, following an unsuccessful attempt to have the dispute resolved between representatives of the three International Unions involved, the Sheet Metal Workers asked the Sheet Metal Workers’ International Association to intervene on their behalf and to request the Plan Administrator to review Hydro’s original assignment. The reasons why the Sheet Metal Workers would do so are obvious in view of the wording quoted above from Clause 2 of Article I of the Plan. If the original assignment has been to the Sheet Metal Workers, Clause 2 would prohibit Hydro from altering that assignment. The International Association notified the Administrator of the Sheet Metal Workers’ claim that Hydro had changed its original assignment and requested the Administrator to notify Hydro “...that it is a violation of the Procedural Rules of the Plan for the Settlement of Jurisdictional Disputes for a Contractor to change a work assignment”. The letter goes on, “We further request you to instruct the Contractor to revert to the original assignment which was based on the Agreement between the Boilermakers Union and the Sheet Metal Workers’ Union, dated June 28, 1957 and on Ontario Hydro past practice”. Five days later, the Plan Administrator, Witcraft, advised EPSCA by letter of the Sheet Metal Workers’ claim, stating in major part as follows:

...

If the information contained therein is accurate, such action constitutes a violation of the Procedural Rules of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. Contractor responsible for the work is directed to proceed immediately with the disputed work in accordance with the original assignment.

It is a violation of the Procedural Rules for a contractor who has made a specific assignment of work to change such assignment unless there is agreement between the trades involved or a directive from this office.

Please furnish by return communication complete facts and circumstances regarding the initial assignment of the disputed work.

Hydro replied to Witcraft's letter advising him that there had been no change in the original assignment. That communication was relayed to the Sheet Metal Workers' International Association by Witcraft, who also requested that he "be advised". This information in turn was sent by the International Association to the Sheet Metal Workers seeking their comments. There is no evidence before the Board of any further action taken by the Sheet Metal Workers or its International Association prior to the making of this complaint.

14. Those are the events on which the Sheet Metal Workers rely for their alternative position that the conditions of Clause 8.7 have been satisfied and, as a result, the collective agreement would allow the Board to entertain the complaint, section 91(14) of the Act notwithstanding. It is the Sheet Metal Workers' position that the three collective agreements contain the same saving clause which provides that the parties to the agreements "...shall have recourse to the Ontario Labour Relations Board for a decision", if the tribunal established under the Plan "...fails to render a decision within sixty (60) days of the disputed assignment being referred to [the Administrator],...". Counsel for the Sheet Metal Workers argues that, by the time this complaint was made to the Board, sixty days had elapsed since the Administrator had been requested to "...notify [Hydro] that it is a violation of the Procedural Rules of the Plan For The Settlement of Jurisdictional Disputes for a Contractor to change a work assignment." and to instruct Hydro to revert to the original assignment. Therefore, since the Administrator had not rendered a decision within sixty days of the work jurisdictional dispute being referred to him, the Sheet Metal Workers had recourse to the Board herein for resolution of the complaint.

15. Counsel's position clearly is that the start of the sixty days was triggered when the Administrator was requested to direct Hydro to restore the original assignment. In other words, counsel is saying that, when the Sheet Metal Workers made the request for a procedural ruling from the Administrator, they were referring to a dispute to which Clause 8.7 applied. Assuming that to be correct, when the Administrator, through EPSCA, directed Hydro as the contractor having control of the disputed work to "...proceed immediately with the disputed work in accordance with the original assignment.", the Administrator was rendering a decision on the disputed assignment which had been referred to him. Since his decision was rendered within sixty days, there is nothing left for which the parties require recourse to the Ontario Labour Relations Board.

16. This panel of the Board, however, does not consider that to be a fair reading of clauses 8.5 and 8.7. Clause 8.5 states that, when the steps required under the collective agreement for attempting to resolve a work assignment dispute have been exhausted and the dispute remains, the dispute shall be submitted to the IJDB and its decision will be final and binding on the parties to the collective agreement. When Clause 8.7 speaks of the IJDB failing "...to render a decision within sixty (60) days of the disputed assignment being referred to [it], ...", the decision of which it is speaking is the same decision to which Clause 8.5 refers; in other words, a final and binding decision on the work assignment dispute that has been referred to the IJDB pursuant to Clause 8.5. Now that the Plan gives the function of making final and binding decisions on work assignment disputes to an arbitrator instead of the IJDB, the language of Clause 8.7 contemplates a decision by an arbitrator under the Plan respecting a work assignment dispute referred to the arbitrator pursuant to Clause 8.5.

17. In order for a dispute to be heard by an arbitrator, Article V - Resolution of Jurisdictional Disputes - of the Plan requires certain steps to be taken by the parties. Section 3 of the article provides that, where the parties are unable to resolve the dispute, any of them may request arbitration by filing a notice to arbitrate with the Administrator. Upon receipt of the notice, the

Administrator implements steps for an arbitrator to be appointed. Section 7 requires the arbitrator to issue his decision within three days after the closing of the case and his decision is binding on all parties to the dispute. In the Board's view, that is the final and binding decision to which Clause 8.5 of the Agreement refers and is the same decision referred to in Clause 8.7. The decision can only be made if one of the eligible parties requests arbitration of the dispute by filing a notice to arbitrate with the Administrator of the Plan. This had not been done as at the making of this complaint and as at the date when it came before the Board for hearing. Therefore, assuming without deciding that Clause 8.7 would permit the Board to retain jurisdiction under section 91(1) of the Act to entertain this complaint, the conditions of the clause have not been satisfied on the facts of this case.

18. In all of these circumstances, the Board finds that, by operation of subsection 14 of section 91 of the *Labour Relations Act*, the Board does not have jurisdiction to entertain this complaint. The complaint is dismissed.

2641-85-R Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Elgin Handles Limited**, Respondent v. Group of Employees, Objectors

Certification - Petition - Opposition to certification application consisting of the leadership of a pre-existing employee association which had "negotiated" two "contracts" with the employer - Petition found to be voluntary despite fact that petitioners were lead hands, familial relationships with management existed, and association meetings were held on company premises - Long-standing polarization of employees as to unionization key factor in assessment of voluntariness - Vote ordered

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. H. Wightman and A. R. Foucault.

APPEARANCES: Eric del Junco and E. H. Winegarden for the applicant; P. M. Rusak and K. Day for the respondent and F. G. Jones and George Lee for the objectors.

DECISION OF S. A. TACON, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN;
April 6, 1987

1. The name of the respondent is amended to read: "Elgin Handles Limited".
2. This is an application for certification in which a statement of desire in opposition to the application was filed with the Board (see para. 6, 7 *infra*). It should be noted at this point, however, that the nucleus of the opposition to the certification application was the leadership of a pre-existing employee association which had "negotiated" two "contracts" with the respondent. The association is described in more detail *infra* (at para. 12 in particular).
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties reached agreement as to the bargaining unit description. Having regard to

that agreement, the Board finds the following to constitute a unit of employees appropriate for collective bargaining:

all employees of the respondent in St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 10, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A statement of desire was filed with the Board containing the signatures of forty employees including thirteen employees who had previously signed membership cards in support of the applicant. As well, there were filed revocations from nine persons who had signed the statement of desire and who were thereby re-affirming their support for the applicant.

7. The Board found the revocations not to be relevant since, even if proved voluntary, there is insufficient overlap between those revocations and the signatures of persons on the statement of desire who had previously signed membership cards to render the petition irrelevant. That is, if the statement of desire is proved voluntary, there would be sufficient doubt raised as to the level of continued support enjoyed by the applicant that the Board would normally exercise its discretion pursuant to section 7(2) of the *Labour Relations Act* to direct a representation vote notwithstanding the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time and that there were revocations from some of those persons signing the statement of desire re-affirming their support for the applicant.

8. The Board heard evidence from six witnesses called by counsel for the employee objectors and five witnesses testifying on behalf of the applicant. It is necessary to note at this juncture that the only issue in dispute before the Board concerns the voluntariness of the petition. The applicant did not file any section 89 complaints alleging that the respondent had committed unfair labour practices during the relevant period. It is also useful to here clarify the terminology. The applicant is the Teamsters. The union which twice previously had attempted to be certified at the plant is the Moulders. The employees' organization is referred to as the association.

9. The Board has assessed the credibility of the witnesses according to the usual criteria including the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanor, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

10. It is necessary to comment generally on the credibility of the witnesses at this point. There was no order sought excluding witnesses and it was evident that the applicant's witnesses had tailored their evidence in light of the prior testimony of others and what they assumed would be in the applicant's best interest. Moreover, much of the testimony from the applicant's witnesses was in response to leading questions, despite repeated objections from opposing counsel and reminders by the Board that such responses may be given little weight. The Board also notes that, with several of the applicant's witnesses, counsel sought to "jog" the witnesses' memory after apparently exhausting that memory without elucidating the anticipated evidence. The Board permitted that process, for reasons set out in several oral rulings which need not be repeated herein,

but stated that the parties were free to argue as to the appropriate weight to be given to such testimony. In the Board's view, such evidence has minimal probative value. Finally, the self-serving nature of much of Millard's evidence, in particular, is noted. For example, "notes" ostensibly taken contemporaneously with events were acknowledged as inaccurate as to date and time in some instances, taken on instructions in preparation for the hearing and conveniently selective as to the information recorded. The Board, therefore, generally disregards the evidence of the applicant's witnesses as not credible and, specifically, prefers the accounts of the witnesses called on behalf of the employee objectors wherever there are conflicting versions of events. In contrast, the testimony of those involved in circulating the petition was given in a straightforward manner without guile or attempt to portray events in a light favourable to their interests.

11. Having weighed and assessed the evidence, including the credibility of the witnesses, in the above context, the Board makes the following findings of fact.

12. It is first necessary to briefly sketch the background to the more recent events culminating in the petition filed with the Board. The company operates in two locations, the main plant and the Gaylord plant, about two miles apart. Several years ago, the Moulders tried to organize the plant. A representation vote was held; the union "lost" that vote. The employees formed an employees' association to represent them, consisting of four employees ("committeemen") elected from six nominees. Tom Clark was one of the original committeemen. The association "negotiated" two contracts with the company (June 1984 to May 1985; May 1985 to September 1986). Each time, bargaining meetings were held and the tentative contracts ratified by vote of the employees. The "contract" dealt with items such as wage rates, grievance procedure, benefits, company rules. The complaint procedure was used on occasion. The 1985 - 86 contract was negotiated by G. Lee, Clark, T. Keates and G. Dueck. The Moulders launched a second organizing drive. Clark and another employee, Lee, were involved in circulating a petition opposing the union. The petition was drafted by a lawyer, G. Jones, who is also present counsel for the employee objectors. The Moulders agreed to a second representation vote; this vote, too, was lost by the union.

13. In December, 1985, John Tadema (plant superintendent) and K. Day (president) met with the lead hands, including Lee, Harold Tadema Jr., and C. Jordan. Such meetings had been held in the past, although not on a regular basis. The company indicated its business projections for the next year were bleak. Business in the past year had fallen off, the company was considering a thorough time study of the operation and the prospect of importing turned handles from the U.S. was raised. The importation of turned handles had occurred to some extent for the past two years but, at this point, the company indicated such turned handles could be bought as cheaply as performing that operation in the plant. If U.S. handles were to be brought in on a large scale, the company indicated significant layoffs, on the order of perhaps fifty per cent of the plant, would result.

14. On January 10, 1987, following the Christmas shut-down, John Tadema met in his office with the association committeemen. D. Worotny, Keates, and Lee attended; B. Martin did not. The company covered the points raised in December about the grim business outlook, U.S. handles and layoffs. For example, the company stated that it had increased prices during the past year as a result of the contract negotiated and had lost a large customer as a result. The extremely high rate of absenteeism was also discussed at length. Near the end of the meeting, B. Bolt (a foreman) interrupted to inform John Tadema privately that there were rumours of another union organizing drive at the plant. John Tadema then returned to the meeting and asked the committeemen if they were aware of this; the men replied in the affirmative. John Tadema indicated his surprise at the organizing as he thought the contract was a good one and the employees were satisfied. Nothing more was said about that subject. The meeting ended with the company asking the com-

mittee to speak with the employees about the absenteeism in particular as this was hurting the company, the business prospects, U.S. handles and layoffs.

15. That same day, Friday, Lee informed Martin of the matters discussed at the meeting. Martin had visited the main plant that afternoon as part of his regular duties driving truck. On his return to the Gaylord plant, Martin asked the foreman, Clark, if he (Martin) could speak with the employees for a few minutes. Clark is the same person who had been involved in the earlier petition and served on the committee; he had been a foreman for several months at that point. About fourteen employees attended the meeting in the lunch room which started at roughly 2.45 p.m. and lasted perhaps ten minutes. Clark, however, was not present. Martin briefly addressed the employees stating that he knew of the union organizing drive, and in his opinion, "anything could happen" if the drive succeeded, including the bringing in of U.S. handles, layoffs or even the sale of the company. Martin stated he would have a petition the employees could sign if they wished. No petition was available at that meeting, however. As the employees were returning to their work stations, Clark emerged from his office, and, in an angry outburst, shouted that another firm was trying to buy the company and that he was "pissed off" that the employees were considering unionization after all he had done as a committeeman in the past in negotiating contracts. Almost immediately, though, Clark calmed down and openly apologized for his conduct.

16. On Monday, January 13, Lee convened an association meeting in the cafeteria at the main plant at 2.00 p.m. during the scheduled work break. Approximately eighty per cent of the employees at the main plant attended. The association obtained approval for the meeting in the usual manner; the company was not told of its purpose. Such association meetings were held approximately once per month in that location. Lee addressed the meeting, stressing the absentee problem, the business projections and his belief that the company could not afford a union, that a union would only compound the company's troubles. In Lee's view, he used the earlier company discussions with the lead hands and committeemen to "score points" for the association. There was no mention of a possible sale of the company. Lee also noted a petition would be circulated amongst employees who wished to oppose the union. Lee informed the employees as well as to when the T.4 slips would be issued. A few questions followed Lee's brief comments. The meeting ended after roughly ten minutes.

17. A further meeting was called by the association for Thursday, January 16 at 7.00 p.m. in the main plant cafeteria. Worotny started the meeting as Lee was late arriving. The earlier points about U.S. turned handles and business outlook were raised. Worotny stated the company had indicated that layoffs would not result unless there was no other option. Any possible sale of the firm was not mentioned. That meeting last until roughly 8.30 p.m.

18. Worotny and Lee discussed the circulation of a petition to oppose the new organizing drive shortly after the January 10 meeting with the company. During the previous Moulders campaign, Worotny had been a union supporter. Lee utilized the wording of the petition used in the Moulders campaign. Copies were made and given to the committeemen and two lead hands, namely, Harold Tadema Jr. and Jordan. Several, including Harold Tadema Jr., Martin and Worotny had not been involved previously with a petition. Signatures were collected outside working hours or on breaks off the company premises or in the cafeteria. The petition was circulated at the association meeting on January 16. The petition organizers did not discuss the petition with management, including Clark. Employees were asked if they wished to sign: those who appeared undecided were approached several times; those who declined were not vigorously pressed. Generally, however, employees asked few questions as most were familiar with the process from the earlier Moulders organizing drive. For example, Martin told employees he approached that he considered Day, the company president, to have fairly treated the workers and the company deserved a

chance to negotiate again with the association as that contract would be up in the Fall. Harold Tadema Jr. approached a number of employees, including the nine assigned to his group. Only two of those signed; the rest declined and were not contacted further by him about the petition. Of the twelve workers at the Gaylord plant, five signed the petition. Jordan, a lead hand, as noted, obtained the signature of one of the twelve workers assigned to his group.

19. It is also useful to review the various familial relationships at the plant. John Tadema, the plant superintendent, is Harold Tadema Jr.'s father; the latter is called "Jr." to avoid confusion with his uncle, Harold Tadema, a foreman. T. Millard, the union organizer, also has a brother, Mike Millard, who is a lead hand at the plant.

20. The Board next sets out the arguments of counsel in a highly abbreviated form. Further, the submissions of counsel arising out of evidence which the Board has found not to be credible are omitted.

21. Counsel for the employee objectors reviewed the evidence in detail. He submitted the company meeting with the lead hands in December 1985 was not improper, dealt with *bona fide* business concerns and clearly pre-dated the union organizing drive. Nor, it was asserted, was the meeting with the committeemen in January improper. Counsel argued the meeting of the employees at the Gaylord and the main plants must be placed in the context of the association relaying the company concerns and conveying the association's opinion of the union organizing drive. Counsel urged the Board to not prefer the testimony of the union's witnesses as to events and statements made. Counsel acknowledged that there were minor errors in the circulation of the petition but stressed that those persons involved were unsophisticated in labour relations jurisprudence. The history of the two earlier organizing drives was emphasized, as well as the novel position of the association as an employee organization with elected representatives which had negotiated two contracts with the company. In summary, counsel argued the petition should be found to be a voluntary expression of the true wishes of the employees. In support, the following cases were referred to: *Radio Shack*, [1978] OLRB Rep. Nov. 1043; *Aluminum Reduction Company*, [1985] OLRB Rep. Jan. 8; *Eddie Black's Limited*, [1985] OLRB Rep. Sept. 1359; *Data Security Limited*, [1985] OLRB Rep. Aug. 1183; *Chatham Concrete Forming*, [1986] OLRB Rep. Apr. 426; *Haughton Graphics*, [1983] OLRB Rep. Sept. 1464.

22. Counsel for the company took no position on the voluntariness of the petition but stressed that the evidence of the applicant's witnesses was opportunistic and self-serving. Examples of such arguably unreliable testimony were given. It was contended there was no evidentiary basis for concluding management had acted improperly or was directing the association in any way, nor could there be a reasonable perception of such involvement.

23. Counsel for the applicant reviewed the evidence in detail, as well, in support of his assertion that the union organizing drive and the possibility of large layoffs had been systematically connected by the committeemen, unwittingly or otherwise, and, thus, the employees would reasonably perceive the petitioners, and the association, were acting on behalf of or aligned with management. The familial relationship of Harold Tadema Jr. to two members of management was emphasized, as were the higher wages paid to the lead hands, several of whom were involved with the petition. Counsel characterized the petition's circulation as "open" and "cavalier" and, thus, adding to his submissions as to the reasonable perception of management support for the association. It was asserted that the testimony of the union's witnesses should be preferred. Counsel for the applicant stressed the meeting at the Gaylord plant and the outburst by Clark. Counsel also stated the fact that the association had not sought status as a trade union within the meaning of section 1(1)(p) of the Act indicated the absence of an arm's length relationship with the company. In

summary, counsel argued that the employee objectors had not satisfied the onus of proving the voluntariness of the petition. In support, counsel referred to the following cases: *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813; *Chatham Concrete Forming*, *supra*; *Terminal Hotel*, [1979] OLRB Rep. June 580; *Quality Circuits Manufacturing Limited*, [1979] OLRB Rep. Aug. 794; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676; *Schenker of Canada Limited*, [1982] OLRB Rep. June 937; *Willow Manufacturing Company Limited*, [1980] OLRB Rep. July 1131; *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545; *Re Chung and Amalgamated Clothing & Textile Workers' Union-Toronto Joint Board et al*, *Re Ports International Ltd. et al* and *Ontario Labour Relations Board et al* (1986), 54 O.R. (2d) 650 (Div. Ct.).

24. It was not disputed that the employee objectors bear the onus of proving that the employees "sudden change of heart" to oppose the applicant after having signed membership cards was voluntary: *Radio Shack*, *supra*. Nor was there disagreement that a petition may be tainted by reason of overt management involvement or on the ground that employees might reasonably perceive that management was involved and, hence, fear that management would become aware of the names of those signing: *Morgan Adhesives*, *supra*. In this context, the Board looks to the overall environment in the work place and the cumulative impact of events. The applicant did not assert actual management involvement in the petition and no allegations of unfair labour practices were filed. However, the applicant asserted the petition should be found not voluntary on the "reasonable perception" branch of the jurisprudence.

25. The Board's findings as to credibility and the probative value of the testimony of the union's witnesses (see paragraphs 9, 10 *supra*) need not be repeated here. However, as a consequence, the Board notes that a number of factors which the applicant stressed as going to the "work place climate" tainting the petition are not substantiated. For example, the Board regards Bolt's dropping by John Tadema's office during the January 10 meeting as coincidence. The evidence established that such visits were frequent during a working day. Likewise, while Bolt was at the plant on Thursday, January 16, there is no evidence to suggest he knew of the association meeting that night or was even in the same area as the cafeteria. Likewise, the applicant's assertions that the petitioners, including a former committeeman, G. Dueck, harassed or intimidated employees are without any merit.

26. The Board must seriously examine the sequence of events and their cumulative impact from several aspects, namely, the status of the petitioners as lead hands and committeemen and any familial relationships, Clark's conduct on Friday January 10 at the Gaylord plant, the association meetings on January 10 at Gaylord and January 13 and 16 at the main plant and the position of the committee itself in the context of the history of union organizing attempts at the plant. The Board is satisfied with respect to the actual circulation and custody of the petition in the sense that the signatures were obtained during non-working hours, including breaks, and away from work stations or off company premises.

27. Involvement in a petition by lead hands does not automatically taint a petition but the Board must have regard to the actual conduct of the lead hands as to whether such behaviour would reasonably be perceived as flowing from their special relationship in the management hierarchy: *Cornelius Manufacturing Company Limited*, Board File No. 1704-84-R, unreported, December 1984; *Quality Circuits*, *supra*; *Dad's Cookies*, *supra*; *Re Chung*, *Re Ports International*, *supra*. Nor does the familial relationship of a petitioner to a member of management inescapably lead to a finding a petition was involuntary: *Eddie Black's*, *supra*. In the instant case, apart from Lee, who was also a committeeman, the lead hands (Harold Tadema Jr. and C. Jordan) were singularly unsuccessful in obtaining signatures of those in their work groups. There is no suggestion

that they used their status in the management hierarchy to obtain signatures or did other than accept an employee's refusal to sign. It is true that Harold Tadema Jr. is the son of the plant superintendent and nephew of a foreman. The Board is satisfied that this familial relationship was not used to influence and did not influence employees to sign the petition and the Board notes, as well, the fraternal relationship of T. Millard, the union organizer, to another lead hand, M. Millard.

28. A novel feature of this case is the existence and operation of the association and the committeemen. This is *not* an instance where the employer suggested or supported the formation of employee's committee in the context of an organizing drive or an *ad hoc* "committee" against a union was organized during a union campaign: *Homeware Industries Ltd.*, [1981] OLRB Rep. Feb. 164; *Upper Canadian Furniture Ltd.*, [1981] OLRB Rep. July 1016; *Willow Manufacturing*, *supra*. The activities of a "committee", if that term is even appropriate, in *Aluminum Reduction*, *supra*, are not analogous. Nor is there any evidence to suggest that the respondent earlier had encouraged the formation of an employees' association to establish a predictable framework for anti-union activity by employees in the event of a later union organizing drive. The Board need not repeat its findings concerning the association in paragraph 12 *supra*, except to note that the association elected four representatives, the committee negotiated two contracts which were ratified by the employees, and held meetings with employees to discuss their concerns. That the association did not seek a Board finding of trade union status within the meaning of section 1(1)(p) of the Act does not lead to the conclusion suggested by the applicant's counsel that the association was not at arm's length from the company. The Board, of course, is *not* making a finding as to the status of the association nor as to whether the "contract" constitutes a collective agreement as defined by the Act.

29. That the committee opposed the union, spoke against the organizing drive and indicated their opinion as to the consequence of unionization is not surprising. Neither is it surprising that the committeemen (Lee, Martin, Worotny and Keates) should be actively involved in circulating the petition. Moreover, the Board is satisfied that, on balance, Clark's outburst, for which he immediately apologized, would be perceived, not as an anti-union statement by management, but a spontaneous reaction by an individual who had served as a committeeman and been involved in negotiating both contracts. It should also be stressed that Clark was not at all involved with the circulation of the petition. There is no doubt that several of the statements made at the association meetings, particularly at the Gaylord plant, as to the company's economic prospects and the possibility of significant layoffs if turned handles were brought in in large quantities, would result, in other contexts, in a finding that the petition was not voluntary. However, those statements reflected legitimate company concerns communicated to lead hands in December, before the union organizing campaign started, and to the committeemen in January following the regular Christmas shut-down and before the company was aware of the organizing drive. Moreover, placed in the context of the other matters discussed, such as absenteeism, and the brief duration of the January 13 meeting at the union plant and the Gaylord meeting on January 10 (both lasted roughly ten to fifteen minutes), the statements are much more akin to "salesmanship" by the committee seeking to defend the association structure, and would be perceived as such, than threats to job security by persons part of, or associated with, management. In this regard, it is critical to note that there was no evidence to indicate that the association was permitted greater leeway in its dealings with employees because of the union organizing campaign. Management did not seek to bolster the association's role or facilitate the association's opposition to the union drive.

30. In the Board's view, the employees have been divided into two core opposing groups for several years. The Board cannot ignore the fact that the Moulders failed to carry majority support in two earlier representation votes. The employees knew about the petition process and representation votes. This is *not* a case where large numbers of employees signed union cards and sud-

denly changed their minds. The Board regards the documentary evidence as reflecting the polarization of the sizeable employee groups for and against the union. What is also critical to note is that the organizing drive and the petition were largely carried on *simultaneously*. Employees *continued* to sign membership cards, as well as revocations, until late January. This case is *not* analogous to those wherein a union campaign is followed by petition reflecting a wholesale change of heart by employees who had just signed membership cards. Rather, in this instance, the applicant and the association conducted concurrent campaigns for support in a sizeable bargaining unit. In only a very few instances did employees maintain a "change of heart" against the applicant.

31. In these circumstances, the Board is no less rigorous in its examination of the overall work environment in determining whether the petition was voluntary. The long-standing polarization of the employees as to unionization, however, cannot be ignored in that assessment, especially given the previous certification attempts and the absence of any allegations of management involvement in the petition or unfair labour practices. The Board reiterates its comments in paragraph 31 *supra* as to the usual effect of statements made during an organizing drive but at meetings where employee support for a petition is sought which touch on layoffs and grim economic prospects. In the context of *this* case, though, the Board is satisfied that, on the balance of probabilities, the onus has been met and the petition is voluntary.

32. Accordingly, the Board directs that a representation vote be held of all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

33. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

34. Voters shall be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

35. This matter is hereby referred to the Registrar.

DECISION OF BOARD MEMBER A. R. FOUCAULT;

I dissent and would have found that, on balance and in all the circumstances of this case, the petition was not voluntary.

2804-86-U; 2805-86-U Fitzhenry and Whiteside Limited, Complainant/Applicant v. Toronto Typographical Union, Local 91 and Nelson Roland, Respondents

Consent to Prosecute - Intimidation and Coercion - Unfair Labour Practice - Witness - Employer alleging respondents misled an arbitrator and intimidated a witness - Complaint found to be an abuse of the Board's process to gain a tactical advantage in respect of other pending complaints - No *prima facie* case

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *J. Sarra*.

APPEARANCES: *H. M. Rossman* and *Robert Fitzhenry* for the complainant/applicant; *James Hayes*, *Douglas Grey*, *Joe Bigeau* and *Nelson Roland* for the respondents.

DECISION OF THE BOARD; April 9, 1987

I

1. This is a complaint under section 89 of the *Labour Relations Act*, which was heard together with an application for consent to prosecute the named respondents in Provincial Court (Criminal Division). A hearing in this matter was held in Toronto on March 5, 1987. At the conclusion of argument, the Board ruled orally, that the application and complaint should both be dismissed. The Board indicated that it would record its rulings, in writing, and issue reasons therefor should either of the parties so request. By letter dated March 19, 1987, the respondents requested that "the decision which was orally delivered on March 5 be reduced to writing along with any elaboration as to reasons which seem [sic] appropriate".

2. For ease of reference the applicant/complainant may sometimes be referred to as "the employer", and the union respondent may be referred to simply as "the union".

II - Consolidation with other matters

3. At the opening of the hearing on March 5, 1987, the employer submitted that its complaint/application should be adjourned and heard later, together with two earlier unfair labour practice complaints which had been filed by the union. Those complaints concerned alleged misconduct in which the employer itself had been engaged. One of these complaints was filed in August 1986. The second one was filed in December 1986. Neither of them had been scheduled for hearing. (They were later settled).

4. After hearing the submissions of the parties, the Board ruled as follows:

"Section 102(13) of the Act gives the Board the power to determine its own practice and procedure. This power is spelled out, more particularly, in Rule 81, of the Board's *Rules of Procedure*, which reads:

"Where the Board deems it necessary, it may at any time direct that a proceeding before the Board be consolidated with any other proceeding before the Board and it may issue such directions in respect of the conduct of the consolidated proceeding as it considers advisable."

We have considered the allegations contained in the most recent complaint

filed by the employer and are satisfied that the events complained of are sufficiently narrow and discrete that there is no reason for this matter to be consolidated with those other proceedings, filed earlier, and currently pending before the Board. Moreover, in the present application/complaint the employer is making allegations of *personal* illegal conduct against counsel appearing on behalf of the union in the two other proceedings. Yet the employer now asks that all three matters be consolidated. The employer submits that, in its opinion, there is no reason why Mr. Roland, a lawyer, could not act as counsel in the two earlier matters, while at the same time being a named respondent in the most recent proceedings brought by the employer, which the employer seeks to have consolidated.

We do not agree. We do not think that the circumstances here warrant a consolidation; and it is difficult to see how counsel could continue to act in a matter in which he was a named respondent whose conduct was alleged to warrant prosecution. This is an additional reason why, in all the circumstances, the proceedings should not be consolidated. Nor is it necessary to postpone or adjourn this case so that they can be heard sequentially. The matters are before the Board, the parties are here, and we are prepared to deal with them today.”

III - The Application/Complaint

5. It is appropriate to comment briefly on the statutory framework within which the parties' rights must be determined.

6. Sections 89(1) and 89(4) of the Act give the Board the *discretion* to inquire into any alleged breach of the *Labour Relations Act*. Section 89(4) also gives the Board a broad remedial authority. However, section 89 is not itself an “offence section” capable of being contravened. An unfair labour practice complaint must be based upon an alleged breach of *some other* section of the Act.

7. Sections 96 - 101 preserve the possibility of quasi-criminal sanctions where, in the opinion of the Board, they may be necessary to bolster the remedies available under section 89, or ensure compliance with the policy objectives of the Act. A consent to prosecute and section 89 complaint can be complementary, but, in recent years, the Board has not been disposed to project parties into the Criminal Courts for the imposition of a “penalty”, where the “remedies” available under section 89 were sufficient to accomplish the statutory purpose. Prosecution remains a residual option reserved for circumstances which clearly warrant it.

8. In the instant case, the particulars of alleged misconduct are the same for both the unfair labour practice complaint and the consent to prosecute. They read as follows:

PARTICULARS OF COMPLAINT

1. On November 25th, 1986, the Respondent Union filed an application under section 45 of the Act for the appointment of an arbitrator to consider three grievances.
2. The said grievances concerned letters sent to certain employees who had been late for work (2 grievances) and an issue of work assignment.
3. The Minister appointed J. W. Kilgour of Oakville, Ontario to be the arbitrator in the above-stated matters.

4. The arbitrator, Mr. Kilgour, scheduled a hearing to take place on December 19th, 1986 at Richmond Hill, Ontario.
5. At the commencement of the said hearing, the Respondent Union, through its counsel, the Respondent Roland, requested an adjournment claiming:
 - a) a subpoenaed [sic] witness, one Joan McCabe, may have been intimidated by the Complainant;
 - b) other witnesses could not be subpoenaed [sic] in time to attend; and
 - c) that certain applications under section 89 of the Act had been filed the day before by the Respondent Union with the OLRB (OLRB File No. 2643-86-U) which should be disposed of prior to the arbitration proceeding.
6. At all times, the Complainant was prepared to proceed with the arbitration hearing and so advised the arbitrator.
7. The arbitrator acceded to the Respondent Union's request and, on January 2nd, 1987, gave written reasons. The arbitrator submitted an account in the amount of \$1,002.88 of which the complainant's share is \$501.44.
8. It came to the Complainant's attention that the employee Joan McCabe wished to correct statements made to the arbitrator by the Respondent Roland but the Respondent Roland refused to allow her to speak.
9. It has also come to the Complainant's attention that no effort had been made by the Respondent Union or the Respondent Roland to subpoena [sic] the other two potential witnesses although they were available at all times.
10. It was the submission of the Complainant at the arbitration hearing that the arbitrator should have embarked upon an examination of the witness Joan McCabe to test the concerns of the Respondents.
11. The Complainant submits that the Respondent Union and the Respondent Roland misled the arbitrator as to the true state of facts with the sole intent of harassing the Complainant and putting the Complainant to needless financial expense.
12. Furthermore, the Complainant submits that the Respondent Union and Respondent Roland misled the arbitrator as to the nature of the section 89 application made the day prior to the arbitration hearing. The contents of the complaint contained in OLRB File No. 2643-86-U have no bearing to the subject matter of the grievances which was before the arbitrator. The Respondent Roland, being a lawyer who practices before the Ontario Labour Relations Board, ought to have been aware that the Board itself does not have jurisdiction to entertain grievances (section 91 (14) of the Act) and that arbitration was the proper forum for those matters.
13. The Complainant further submits that the Respondent Union and the Respondent Roland have abused the processes of the *Labour Relations Act*.

9. The thrust of the complaint is that the employer was put to some expense when an arbitrator granted an adjournment, without condition, (and despite the employers' opposition,) based upon the submissions made to him. Insofar as Ms. McCabe is concerned, paragraph 10 is really a criticism of the arbitrator for not enquiring further into the union's assertions concerning her. With respect to the union's efforts to secure the attendance of witnesses, or the reference to the complaints filed with the Ontario Labour Relations Board, we can only assume that the arbitrator was satisfied by what he heard, and if the employer wanted formal proof of the assertions made or further elaboration it could have and should have made such demand. The reference in paragraph 12 of the complaint is mystifying: section 91 of the Act deals with disputes between unions concerning

the assignment of work. It has nothing to do with the Board's jurisdiction to entertain a grievance alleging a breach of a collective agreement; moreover, the Board *does* have jurisdiction to enquire into any breach of the Act even though the conduct complained of may also be a breach of the agreement.

10. The consent to prosecute application does not allege that any specific section of the *Labour Relations Act* has been violated. It merely complains that the respondents have "misled" an arbitrator appointed under section 45 of the *Labour Relations Act* to deal with a question concerning the interpretation, administration or alleged violation of a collective agreement between the employer and the respondent union. The section 89 complaint relies upon section 80(2) of the Act, which reads as follows:

No trade union, council of trade unions or persons acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

No other section of the Act is referred to or relied upon.

11. We should note that Ms. Joan McCabe, the individual referred to in the employer's application/complaint, does not, herself, make any allegation against the trade union. She does not assert that she was discriminated against, intimidated, or coerced in any way. She has not complained to the Board that Mr. Roland misrepresented her position. She is not a party to these proceedings. Although present in the hearing room on March 5, 1987, there is no indication or assertion that Ms. McCabe accepts or supports the employer's characterization of the situation described in its application/complaint.

12. The employer conceded that the main reason for filing the instant application/complaint was that the union had filed two earlier unfair labour practice complaints. The employer's representative maintained that "what is good for the goose is good for the gander" ... "the Act is there for employers as well as trade unions". If unions can file complaints which may or may not be justified, employers, in response, can file complaints too. This application/complaint was in the nature of a "riposte".

13. The respondents maintained that the application and complaint were frivolous, vexatious, and patently without foundation. The respondents submitted that they should both be dismissed.

14. After hearing argument, the Board agreed with the respondents' characterization of these proceedings. We did not think that the matters referred to by the employer in its pleadings constitute a breach of the *Labour Relations Act*, and certainly there was no breach of section 80(2), the only section pleaded. Indeed, the only question in this regard concerns the position of Ms. McCabe who does not, herself, allege any impropriety on the part of the union; and, we doubt whether the employer is even entitled to assert such claim (see *Quebec Labour Relations Board v. Cimon Ltee.* (1971), 21 D.L.R. (3d) 506; *Cunningham Drug Stores Ltd. v. B. C. Labour Relations Board* [1973] S.C.R. 256; 31 D.L.R. (3d) 459; *Re Canada Labour Relations Board and Transair*

Ltd. (1967), 67 D.L.R. (3d) 421; *Federated Building Maintenance Co.*, [1979] OLRB Rep. Oct. 974; *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331; and *Bennett Paving and Materials Limited*, [1980] OLRB Rep. Nov. 1579). After reviewing the pleadings, and hearing the parties' submissions, the Board concluded that the application/complaint was a rather transparent attempt to misuse the Board's process to gain some tactical advantage in respect of other unfair labour practice complaints currently pending, or in the employer's general relationship with the union. Its purpose was to embarrass Mr. Roland, and embroil the union in litigation in which it would necessarily have to retain and instruct other counsel - as it did for the proceeding before the Board. In short, the objective was to harass the union and generate needless expense. In the circumstances the Board made the following oral ruling, which is hereby confirmed:

"We are satisfied that this complaint and application are without foundation and do not disclose a *prima facie* case for the relief requested. Indeed we would go further, and find that these proceedings are frivolous and vexatious, and undertaken in large measure to impose inconvenience and expense upon the trade union, and to be a "bargaining chip" in respect of other matters currently pending before the Board. As counsel [for the employer] put it, "what's good for the goose is good for the gander". The filing of this application/complaint was purely tactical. But that is not a basis for filing a complaint, which necessarily triggers the private and public costs associated with an OLRB proceeding. For that reason alone, we would not exercise our discretion to inquire into the section 89 complaint or grant consent to institute prosecution. What we have here is an abuse of process, and were it in the power of the Board to award costs we would certainly do so. However, we do not think that we can award costs, but we can certainly dismiss both the application and complaint, and hereby do so."

15. The above-mentioned decision is hereby recorded, in writing, at the request of the respondents.

3104-86-R London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, Applicant v. The Corporation of the County of Grey operating as **Grey County Homes for the Aged**, Respondent

Bargaining Unit - Certification - Persons employed under a co-operative or governmental training program included in bargaining units - *Elizabeth Fry Society of Ottawa* distinguished

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *J. H. Nicholls* for the applicant; *Randolph Kinghorne*, *R. Butcher* and *Brian Manser* for the respondent.

DECISION OF THE BOARD; April 6, 1987

1. The name of the respondent is amended to read: "The Corporation of the County of Grey operating as Grey County Homes for the Aged."

2. This is an application for certification affecting employees of the respondent's home for the aged in the Town of Durham. The applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act*.

3. The parties agree that there are two appropriate bargaining units for the purpose of this application: a unit of "full-time" workers and a unit of "part-time" workers and students employed during the school vacation period. They have agreed that supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff should be excluded from both units. The respondent takes the position that "persons employed under a co-operative or governmental training program" should be excluded from both units; the applicant disagrees.

4. The respondent was invited to state the material facts on which it relies in support of the disputed exclusion. It stated that it has not employed persons under a co-operative training program, although it is engaged in negotiations with respect to the employment of such persons. It has employed persons under governmental training programs for young recipients on welfare payments who are engaged in upgrading of their education to the high school level. The respondent understands that these students receive "credit" for work experience. It has been party to two successive agreements with the Crown in Right of Ontario, as represented by the Minister of Community and Social Services, for the provision of employment experience. By agreement dated August 25, 1986, the respondent agreed to provide "an employment experience for certain students for a period not to exceed twelve weeks from May 1, 1986 to August 1, 1986." It agreed it would "pay each student the current minimum wage and benefits" and that "the maximum working week is not to exceed forty hours per week per student." It also agreed to supply the Ministry with such reports as it might require. The Ministry agreed that it would "reimburse" the respondent "a maximum amount not to exceed \$900.00 per month per student." This agreement was terminable by either party on ten days' notice. In a subsequent agreement dated October 20, 1986, the respondent agreed to "provide a part-time employment experience for certain students from September 1, 1986 to June 1, 1987" and to pay each student "the current minimum wage up to ten hours per week and a maximum of \$50.00 per week." Again, the respondent agreed to provide the Ministry with such reports as it might require, and the Ministry agreed to "reimburse" the respondent "a maximum amount not to exceed \$50.00 per week per student." This agreement is terminable by either party on seven days' written notice. As of the application date, one student was being employed on a part-time basis as a result of this agreement. There were 23 other part-time employees on that date, including 6 described on the employer's list as "student."

5. Each person employed pursuant to these agreements (hereafter referred to as a "subsidized employee") has worked with an employee (hereafter referred to as an "unsubsidized employee") who would fall within either party's description of one or other of the appropriate bargaining units. The unsubsidized employee has trained the subsidized employee to do the work done by the unsubsidized employee; thus, subsidized employees do work ordinarily done by unsubsidized employees. The respondent says it has a unwritten understanding with the Ministry that persons hired pursuant to these programs will not displace current employees or affect the salaries or work schedules of current employees.

6. The respondent argues that subsidized employees do not share a community of interest with other employees because their employment pursuant to the government program is for a fixed period of time, their terms and conditions of employment are responsive to the terms and conditions of the employer's agreement with the Ministry and their work of is of no value in the sense that the work load of other workers is not decreased as a result of their presence and they do nothing which would have been done in any event at no additional cost to the employer. Counsel for the respondent concedes that its contracts with the Ministry do not prohibit it from providing subsi-

dized employees with terms and conditions of employment more favourable than the minimum provisions which are subsidized by the Ministry, nor from continuing to employ a subsidized employee at its own expense at the conclusion of the program. It appears to us that this distinguishes the facts in this case from those with which the Board was faced in *Elizabeth Fry Society of Ottawa*, [1985] OLRB Rep. July 1026, where the Board excluded from a unit of other employees persons employed pursuant to a program which, the Board found, "prohibits any 'supplementation of wages beyond the minimum wage'."

7. The respondent concedes that persons employed under these programs are employees of the respondent to whom the *Labour Relations Act* applies. (If they were not employees of the respondent, they would not fall within the bargaining unit as described by the applicant.) The question is not whether subsidized employees are to be excluded from collective bargaining under the *Labour Relations Act*. The question is whether they are to be included in a bargaining unit with the other employees affected by this application. If they are not, it would follow that they would either be included with the office and clerical employees (if they were to be organized) or form a bargaining unit of their own. As subsidized employees perform work similar to the work performed by other employees affected by this application, it seems more appropriate for them to be included with those employees than with the office and clerical employees. While the subsidized employees' interests with respect to their employment will be substantially different from those of unsubsidized full-time employees and even from those of non-student part-time employees, it is not immediately obvious that their interests differ greatly from those of other students employed part-time during the school year or full-time during the school vacation period, except as a result of their being employed pursuant to these programs. It is the long-standing practice of this Board to include students with part-time workers in a single unit, notwithstanding that there can be substantial differences in interest between the two groups, and it strikes us that a focus on the particular revenue sources against which wage costs are allocated on a cost accounting basis is a potentially unstable and undesirable basis for drawing bargaining unit boundaries.

8. One of the premises of the respondent's argument for exclusion of subsidized employees from a unit consisting of the unsubsidized employees who do similar work is that collective bargaining might result in terms and conditions of employment for subsidized employees which are so inconsistent with the government program, either legally or in a practical sense, that the Ministry would discontinue the program at this work place and these work opportunities would become unavailable. We note, however, that the exclusion of subsidized employees from the bargaining unit for which the applicant seeks certification would not necessarily insulate their employment from the effects of collective bargaining. We can take notice that the employment of persons outside a trade union's bargaining unit to do work which the trade union regards as "bargaining unit work" is often the subject of collective bargaining. Restrictions on the use of such persons to do such work can be the result of negotiations or interest arbitration. If subsidized employees were excluded from the unit for which the applicant seeks certification, the applicant would have no reason to be concerned about the interests of those persons in formulating and pursuing such collective bargaining goals. If subsidized employees are included in the appropriate bargaining unit, on the other hand, subsidized employees would be among those to whom the trade union certified to represent that bargaining unit would owe the duty described in section 68 of the *Labour Relations Act*. While we do not suggest that section 68 would compel the union to take any particular position in bargaining, the inclusion of subsidized employees in the unit would at least require that the union take their interests into account in formulating and pursuing bargaining goals. Assuming, without deciding, that a potential negative impact on the continuation of these governmental programs with this employer is something about which we ought to be concerned in formulating the appropriate bargaining unit, we are persuaded that a concern of that sort is best addressed by

including subsidized employees in the bargaining unit in which they would fall if their employment were not subsidized.

9. Accordingly, and having regard to the partial agreement of the parties, we are satisfied that the appropriate bargaining units in this application are described as follows:

Bargaining Unit #1 - full-time

all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Durham, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period;

Bargaining unit #2 - part-time

all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Durham regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in each of these bargaining units at the time this application was made were members of the applicant on February 25, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. Certificates shall issue to the applicant with respect to each of the aforesaid bargaining units.

1932-86-M United Steelworkers of America, Applicant v. Ivaco Rolling Mills, Division of Ivaco Inc., Respondent

Certification - Employee Reference - Union certified after agreement reached with employer that certain employees would be excluded from the unit "for purposes of the count" - Union subsequently applying for a determination of whether these persons are "employees" within the meaning of the Act - Board concluding these persons cannot be the subject of an employee reference - An agreement by the parties that an employee will be excluded from the count for no particular reason cannot form the basis of a certification decision - Application dismissed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. Montague*.

APPEARANCES: *Brian Shell*, *Paula Turtle* and *Ronald Pageau* for the applicant; *G. G. Smith*, *J. Neysmith*, *B. Roddick* and *W. Dewar* for the respondent.

DECISION OF THE BOARD; April 10, 1987

1. This is an application under section 106(2) of the *Labour Relations Act* by the applicant union for a determination of whether four individuals are "employees" within the meaning of that Act. The respondent employer alleges that they are excluded from the bargaining unit by virtue of section 1(3)(b) because they exercise managerial functions. The applicant disputes this claim. The respondent has asked us to dismiss the application without an examination of the merits on the basis of certain considerations stemming from the history of this matter between the parties.

2. In June of 1986, the union in this case applied for certification for a tag-end bargaining unit of quality control inspectors and mill recorders employed by the respondent. This same union also holds bargaining rights for a larger unit of production employees at the plant. On the day appointed for the hearing of the certification application, the parties met with a Board Officer in accordance with the Board's usual practice, and agreed upon a description of the appropriate bargaining unit. The parties also identified a total of 19 employees said by the union to fall within the bargaining unit. The employer took the position that all 19 employees were excluded from the unit either because they exercised managerial functions (the quality control inspectors) or because they did not share a community of interest with other employees in the unit (the mill recorders). Both parties were aware by the end of the day that the union had submitted membership cards for 15 employees and that certification was likely to occur at some point.

3. Because of the dispute with respect to the status of these employees in this bargaining unit, the parties waived their right to a hearing on that day and the Board appointed a Board Officer to inquire into and report back to the Board on the dispute. (See *Ivaco Inc.*, Board File 0620-86-R, unreported June 26, 1986.)

4. The Board Officer set up a series of meetings between the parties on July 22nd, 23rd, August 12th, 13th, 19th and 20th for the purpose of conducting examinations of the duties and responsibilities of the employees in question and inquiring into the community of interest dispute. On July 22nd the parties met, and rather than commencing the examinations, they attempted to negotiate a settlement of their differences. Negotiations continued on July 23rd and a number of proposals were exchanged by the parties. One of those proposals contained a condition that the union refrain from subsequently applying under section 106(2) for a determination with respect to the four individuals who are the subject of the instant application. The union refused to agree to this stipulation. By the end of the day on July 23rd, we concluded that the parties had staked out some common ground and were close to an agreement. On July 24th, Brian Shell, the union's counsel, called the company on behalf of the union and discussed an agreement with John Neysmith, the employer's manager of personnel and industrial relations. That day Mr. Shell sent a letter to Mr. Neysmith setting out the terms of an agreement which Mr. Neysmith signed and returned. The following is an excerpt from that agreement.

The terms of settlement between us are as follows:

1. The company and the union agree to waive any further hearing or examination before the Board as directed by the Board in its decision dated July 3, 1986 and hereby jointly request the Board to proceed with the Application for Certification.
2. The company shall delete from Schedule "A" the names of
 1. R. Ravary
 2. M. Bernique

3. J.P. Jalbert

4. V. Lambert

3. The four persons named in the preceding paragraph are deleted on the basis of the company's position that they are not "employees" within the meaning of the Act but that they are persons who "exercise managerial functions" within the meaning of section 1(3)(b) of the Act. For purposes of the count, the union consents to the exclusion of the four persons named in the preceding paragraph.
4. The union agrees that the four persons listed as "Mill Records" on Schedule "A" should be deleted and the union agrees that the four "Mill Recorders" have a community of interest with the "office and clerical" employees of the company.

5. As it is possible to see from this excerpt, the parties agreed that a total of eight persons would be deleted from the list of employees; four mill recorders and four named employees in paragraph two, who are also the subject of the instant application. However, different wording is used with respect to these two groups of employees. The union agrees in paragraph four both that the mill recorders should be deleted from the list and that they have a community of interest with office and clerical employees. The parties had previously agreed that office and clerical employees would be excluded from the bargaining unit on the basis that they did not share a community of interest with other bargaining unit employees. With respect to the four named individuals, it is argued that the union agrees only to the exclusion of these people "for the purposes of the count", and that no rationale for the union's agreement is set out.

6. Mr. Neysmith specifically noted this qualifying phrase when the agreement was sent to him as he was concerned that it might mean that the four named employees could be the subject of an application under section 106(2) at some point in the future. He therefore sought legal advice and was advised that his concerns were unfounded, following which he signed the document. He did not speak to Mr. Shell to clarify this point; neither did Mr. Shell specifically bring it to his attention.

7. On the basis of their agreement, the Board issued a decision on August 27, 1986, certifying the union as the bargaining agent for the remaining quality control inspectors (see *Ivaco Inc.*, Board File 0620-86-R, unreported, August 27, 1986, hereafter called the "Mitchnick panel decision"). Paragraph two of that decision reads as follows:

The parties have now agreed that:

R. Ravery Quality Control Inspector

M. BerniqueQuality Control Inspector

J. P. JalbertQuality Control Inspector

V. LambertQuality Control Inspector

exercise managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act* and are not "employees" for the purposes of the Act, and that

Douglas Brown Mill Recorder

Daniel JalbertMill Recorder

Bernard LevacMill Recorder

Claude PortelanceMill Recorder

have a community of interest with the office and clerical employees and are thus excluded from this bargaining unit.

8. Mr. Shell told the Board that this decision was in error. The union had not agreed that the four named individuals were exercising managerial functions and were thus excluded from the bargaining unit. Rather, the company had taken this position and the union had agreed only that these four would be excluded for the purposes of the count. The union's intention was to try and settle the still outstanding dispute regarding these individuals in the collective bargaining process. If the parties were unable to settle the matter in their negotiations for a contract, the union intended to apply to the Board under section 106(2) for a determination. The Board was told that no request for reconsideration was filed because the error escaped Mr. Shell's attention at that time.

9. The parties subsequently attempted to settle this matter in their contract negotiations without success and on October 7, 1986 the union filed the instant application under 106(2) of the Act.

10. On the basis of these facts, Mr. Smith argued for the employer that we should construe the agreement to mean the parties had agreed that the four individuals in question were excluded because they exercised managerial functions. According to Mr. Smith, the words "for the purposes of the count" were meaningless because both parties knew that the union was in a position to be certified regardless of the composition of the unit. In his view, the Board's decision of August 27, 1986 correctly reflected the parties' agreement. In light of that decision, Mr. Smith argued, the status of these individuals had been established by the Board and they cannot now be the subject of an application under 106(2).

11. Counsel for the union acknowledged that the Board's jurisprudence establishes that the Board will restrict an application under section 106(2) during the first set of negotiations following an agreement under certain circumstances. However, he argues that the line of authority only applies where there has been an agreement with respect to employee status which, he asserts, was not the case here.

12. Mr. Shell drew a distinction between agreeing upon the list of employees for the purposes of the count, and agreeing that certain individuals are excluded from the bargaining unit because they exercise managerial functions. As he alleges that the agreement in this case reflected only the former proposition, the Board should not decline to entertain an application for an examination of normal scope under section 106(2).

13. The Board's attention was drawn to the fact that this was not a case where the union was attempting to gerrymander the bargaining unit by agreeing that certain employees were excluded so that it could obtain a certificate which would otherwise have been beyond its reach. Rather, counsel alleges that the employer was abusing the Board's procedures to stall the advent of collective bargaining by agreeing on a description of the bargaining unit and then claiming that all employees within that description should be excluded. It was in an effort to address this situation, counsel argues, that the union made the agreement that it did.

14. Mr. Shell submitted that there is nothing in the Act which would prevent such an agreement and that there is nothing untoward or noxious about it. He analogized the situation to the Board's policy set out in *Robin Hood Multifoods*, [1985] OLRB Rep. July 1159 to the effect that final rather than interim certificates will be issued where the contours of the bargaining unit are not in dispute even where the status of certain individuals is contested. As the Board noted in that case, the outstanding dispute may either be settled in collective bargaining or may be referred to

the Board subsequently under section 106(2). This, it is argued, is similar to the procedure the union adopted in this matter. In his view, possible abuses of such a procedure including gerrymandering or sweetheart agreements could be adequately dealt with under other sections of the Act.

15. Section 106(2) of the Act provides as follows:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

16. The Board has delineated certain restrictions which may apply in considering an application under this section. In *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572, the Board noted that it will not permit an application to be brought during the first set of negotiations following an agreement upon an employee's status except where changes in the employee's duties and responsibilities are alleged:

Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18).

It was common ground that there has been no change in the duties and responsibilities of the four individuals who are the subject of this application since the agreement was reached.

17. Much of the parties' agreement centered around the interpretation of the July 24 agreement. However, in determining whether that agreement was an agreement on employee status such as to trigger the application of the *Westmount Hospital* policy, we need look no further than the Mitchnick panel decision. The parties' agreement on the employee status of these four people is recited on the face of that decision, and we are not prepared to go behind it. If the applicant wished to maintain that the decision was in error, that assertion should have been raised by way of an application for reconsideration directed to the Mitchnick panel.

18. Moreover, even assuming, without finding, that the nature of the agreement was as the union asserts, we are not convinced that such an agreement can form the basis of a certification decision under the *Labour Relations Act*. We have set out our views in this regard at some length below as the parties may find them useful in ordering their affairs.

19. The Board has long recognized that certification applications in particular must be processed expeditiously. (See, for example, *Canada Dry Bottling Company (Kingston) Limited*, [1978] OLRB Rep. Nov. 976.) The courts have also acknowledged this element of urgency in *Nick Masney Hotels Ltd.*, 70 CLLC, ¶14,020 (Ont. C.A.) at page 101:

The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standard that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees

and to an employer since the certification is merely the first step in an often laborious collective bargaining process....

20. Sections 6 and 7 of the *Labour Relations Act* establish the Board's primary tasks in a certification application. Among other things, the Board must determine the appropriate bargaining unit, must ascertain the number of employees in that unit as of the application date, and must determine the number of those employees who were members of the union. To accommodate those tasks in an expeditious manner, the Board has established a number of routine procedures in certification applications (other than those affecting the construction industry) to assist the parties in either settling their cases or narrowing the issues in dispute. In the normal course of events, the parties are required to file certain material in advance of the day of hearing, including, in the case of the employer, lists of employees employed as of the application date. A number of issues will then be canvassed with the parties, either by the Board or by a Board Officer, to clarify the parties' positions and attempt to settle some or all of the issues in dispute. The proper name of the employer, the composition of the bargaining unit, the list of employees in the bargaining unit, and the "count" (the assessment of the number of union members in relation to the total number of employees in the bargaining unit) are typical of the matters reviewed with the parties in this manner.

21. This review will usually take place in a very specific order to avoid the possibility of gerrymandering by one or more parties to the proceedings. As the Board described in *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618:

7. The Board's Rules and the certification hearing are ordered precisely to avoid the mischief of either party gerrymandering the employee list or the structure of the bargaining unit in such a way as to avoid or favour certification, as the case may be. Pursuant to Form 3 [now Form 4] of the Board's Regulations an employer is required to provide to the Board, not later than the terminal date, complete lists of employees in the bargaining unit proposed by the union on the date of application. The late filing of lists or amendment of lists filed can be only by leave of the Board pursuant to its discretion under section 58 [now section 83] of the Rules of Procedure.

8. At the outset of the hearing the Board will generally allow the employer to amend the lists filed to reflect any new information not previously available or to correct any error. *During the hearing the Board does not announce the count of employees or any union membership until the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been made to that point in the hearing. These are rules well known to the parties and articulated in the Board's jurisprudence.* (See, *Gwell Investments Ltd.*, [1971] OLRB Rep. Oct. 675; *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370; *Inter City Food Services Inc.*, [1976] OLRB Rep. July 388; *Greater Windsor Investments Ltd. Windsor Nursing Home*, [1976] OLRB Rep. Sept. 515. Without these general rules certification hearings would be endless meandering without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interest. That is why, absent extraordinary circumstances, the Board does not entertain submissions on the structure of bargaining unit or list of employees in the unit after the point in the hearing when the count has been given.

[emphasis added]

22. When the parties examine the list of employees, they will do so with a number of considerations in mind. In the first place, a number of individuals who might normally be described as "employees" in the generic sense are not deemed to be employees by virtue of section 1(3) of the *Labour Relations Act*. Commonly, a party will allege that an individual is excluded from the bargaining unit because he or she exercises managerial functions or is employed in a confidential capacity with reference to section 1(3)(b).

23. Other considerations include several guidelines developed by the Board to ascertain the number of employees in the bargaining unit at the time the application was made. The fluid nature of labour relations means that employees may be continuously coming and going as a result of hiring, firing, layoffs, leaves of absence and so forth. There is no indication in the Act of the method or criteria to be used by the Board in addressing these circumstances, and as a result, the Board has developed a number of rules of thumb in order to pinpoint in a consistent and predictable manner the number of employees in a given bargaining unit. (See *Ampliphone Canada Limited*, [1967] OLRB Rep. Dec. 840 and *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. April 461.)

24. A typical example of these rules is the succinctly described "30-30" rule which the Board uses in determining whether an employee who is absent on the day of the application will be included in the assessment of the total number of employees in the bargaining unit. Another is the "7-week rule" which the Board uses to assist in determining whether employees will be considered full-time or part-time.

25. However, although all of these factors may be considered by the parties in reviewing the list of employees, and ultimately by the Board if any disputes which arise cannot be settled, there are major differences in the nature and impact of these various criteria. An employee who falls outside the 30-30 rule may not be included in the total number of employees for the purposes of the count. Such an individual may still be an employee under the Act and may be subsequently included in the bargaining unit depending on the circumstances of the case.

26. In contrast, an employee who is excluded from the bargaining unit because she or he exercises managerial functions is not simply excluded for the purposes of the "count". For such an exclusion to occur, there must be either evidence before the Board or an agreement by the parties as a matter of fact that the person exercises managerial functions. If the Board finds, either on the basis of the parties' agreement or on the evidence, that an employee is excluded from the bargaining unit for this reason, that person is no longer considered to be an employee with respect to certain aspects of the *Labour Relations Act*. This is not necessarily a permanent state of affairs. Circumstances in the workplace may change, or the impact of an agreement may expire after a certain period, and the Board has established certain rules which balance the recognition of these facts with the need for some stability in labour relations. (See *Westmount Hospital*, *supra*).

27. In practical terms, the Board is usually (although not always) prepared to accept the agreement of the parties that as a matter of fact, an individual exercises managerial functions. In doing so, however, the Board does not surrender its mandate to ascertain the number of employees in the bargaining unit. Rather, in the interests of common sense and the viability of the certification process, the Board simply recognizes the futility and disruption which would be caused by holding hearings into uncontested facts.

28. However, the agreements of fact upon which the Board may base a decision are exactly that. The Board cannot accept an agreement by the parties that an employee will be excluded from the count for no particular reason relating to the employee's status or the Board's rules of thumb. There must be facts before the Board justifying such an exclusion, even if those facts are framed in rather summary terms, such as where the parties agree that an individual exercises managerial functions. Parenthetically, we note that it is of first importance that such agreements are not entered into lightly or insincerely, since the impact may be to deprive an individual of the right to participate in collective bargaining.

29. In this case, the applicant alleges that the respondent took the position that the four named individuals were excluded by virtue of exercising managerial functions. The applicant, it is

argued, agreed only that the four were excluded for the purposes of the count. There is no allegation that the disputed employees were caught by one of the Board's rules of thumb which would exclude them from the bargaining unit for the purposes of the count but otherwise leave their employee status intact. The only reason submitted for the applicant's agreement was entirely unrelated to the status of these individuals; that is, that the agreement was a defensive strategy in the face of alleged abuse of the Board's procedures by the employer. If indeed the agreement was as the union asserts, it is not one that can provide the basis of a determination by the Board of the total number of employees in the bargaining unit, a determination which in some form is critical to the disposition of an application for certification. To accept such an agreement would represent an abdication by the Board of its responsibilities under section 7 of the Act. In effect, the parties would be making the assessment of the number of employees, rather than simply agreeing on facts which might form the basis of the Board's assessment.

30. Moreover, allowing such agreements as the basis for determinations in certification applications might well open the door to gerrymandering by the parties. The Board is not unaware that some jockeying for position exists now in the certification process (see *Maple Lynn Foods Limited*, [1984] OLRB Rep. Dec. 1749). However, the Board's procedures have been crafted to minimize this phenomenon to the extent possible. While we have no doubt that the applicant was not attempting to gerrymander the unit in this case, there would be little to prevent such attempts by other parties in other matters if we were to contemplate the applicant's interpretation of the agreement as a basis for a certification decision by the Board.

31. Even assuming, without finding, that the employer was abusing the Board's procedures, the applicant's approach is not a solution to such a problem. The Board is sensitive to the possibility that its procedures may be used for ulterior motives and the appropriate course of conduct would have been to raise these concerns before the panel hearing the certification application.

32. At this point, however, the Mitchnick panel decision recites an agreement by the parties which would attract the consequences described in *Westmount Hospital*, *supra*. Under the circumstances, we are not prepared to entertain this application on its merits. The application is dismissed.

2844-86-R Bruno Fiorini, Applicant v. United Steelworkers of America District #6, Respondent v. Rembrandt Jewelry Manufacturing, a Division of Johnson Matthey Limited, Intervener

Petition - Termination - Supervisor becoming member of bargaining unit - Supervisor originating and circulating petition - All of the employees he formerly supervised signing the petition - Identification with management casting doubt on voluntariness of petition - Application dismissed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *Bruno Fiorini* and *Hugh MacKenzie* for the applicant; *Brian Shell*, *Brando Paris* and *Ruben Heikura* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; April 22, 1987

1. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent union with respect to a unit of full-time employees employed in a jewelry manufacturing plant.

2. The respondent was certified to represent these employees in October of 1985. Since that time, the union and the employer have been unable to effect a collective agreement. A conciliation officer was appointed on June 3, 1986. However, more than six months have elapsed from that appointment and the respondent concedes that the application is timely.

3. There were thirteen people in the bargaining unit as of the date of the application. The applicant filed three documents purporting to be signed by forty-one employees signifying that they no longer wish to be represented by the union. These documents were filed by February 3, 1987, the terminal date fixed for this application. If the signatures on the petition documents are voluntary, they would represent not less than forty-five per cent of the employees in the bargaining unit. In these circumstances, the Board undertook its usual inquiry into the voluntariness of the petition.

4. Bruno Fiorini gave evidence with respect to the origination, preparation and circulation of the petition. He is employed by the intervener employer as a jeweler and he has some eighteen years of experience in his field at a number of different companies. Until one and a half years ago, he was employed as a supervisor in this plant.

5. In March of 1986, Mr. Fiorini determined that he did not wish to pay dues to the union as he was of the view that the intervener was treating employees fairly. He then sought out legal assistance.

6. The evidence with respect to how he arrived at the offices of his current counsel is a little unclear. Mr. Fiorini first described to the Board a somewhat confused sequence of events involving a phone call to a lawyer, followed by a call to the lawyers referral service and subsequently a call to the lawyer he ultimately retained. In cross-examination, he initially admitted that he had seen the telephone number of the lawyers referral service posted on the bulletin board at the plant and then denied it.

7. In any event, he eventually attended at the offices of his counsel in March of 1986. At that time he was advised that an attempt to terminate the union's bargaining rights would be untimely and was told to come back the following November.

8. Mr. Fiorini attended at his lawyer's offices again in November, 1986, at which time he provided his counsel with a retainer and was given a number of identical petition forms on which he subsequently collected the signatures of other employees. On each of these forms there was a heading in English as follows:

We, the undersigned employees of Rembrandt Jewelry Manufacturing Limited state that we no longer wish to be represented by the United Steelworkers of America and desire that the right of that union to bargain on our behalf be terminated.

9. Mr. Fiorini testified that he could not read English and that this was true of a number of other employees. When this fact emerged in cross-examination, he told the Board that he had explained the purpose of the petition to those employees. He had not mentioned this in the course of the Board's inquiries despite a number of questions directed at conversations with employees at the time the petition was signed.

10. On Friday, November 21, 1986, Mr. Fiorini arranged to book a banquet room at a

pizzeria several miles from the plant. At lunchtime that day, he walked around the lunchroom telling employees that he was holding a meeting in the banquet room the following Monday after work for employees who wanted to get rid of the union. He made a similar circuit of the lunchroom on Monday at the lunch break. While members of management eat their lunch in this lunchroom, Mr. Fiorini testified that none were present when Mr. Fiorini was advising employees of the meeting. He was adamant that this notification to employees was the first time that he had expressed his anti-union views or discussed these matters with any employees. He also testified that he had not discussed the meeting or the application with members of management.

11. At the time appointed for the meeting, Mr. Fiorini placed a blank petition form on a bar in the banquet room and stood behind it. As employees came in, they signed the forms immediately. There was no discussion or debate by employees at the meeting and there was no campaigning by Mr. Fiorini in advance. He also testified that this was an individual project on his part. After employees signed, they sat down at tables and ate pizza. Some thirty-four employees signed at this time over a period of one-half hour to forty-five minutes.

12. The following day, seven more employees approached Mr. Fiorini at lunchtime, asking to sign the paper. Mr. Fiorini arranged to meet them after work at a parking lot across the street from the intervenor's premises. It appears that this parking lot is visible through a large window in the factory. All seven employees signed at that time.

13. Much was made of the fact that Mr. Fiorini used three forms and employees signed on the second and third form before all the spaces were filled on the first form. Mr. Fiorini was not sure in which order employees had signed but denied vehemently that more than one employee had signed the forms at the same time. He assured the Board that he had witnessed each and every signature although he did not sign his name as a witness beside each signature until he was advised to do so at his lawyer's office. Prior to that he had signed at the top of the document and at the bottom with an arrow connecting his two signatures.

14. Mr. Fiorini was not a very convincing or candid witness. He was frequently unresponsive to questions asked in cross-examination and changed his answers on a number of occasions. During the course of the hearing, he also appeared to be structuring his evidence in the interests of his case as he perceived them from time to time.

15. Nevertheless, it was also clear that he had intermittent moments of candour. Having had an opportunity to assess his evidence under vigorous cross-examination, we are satisfied at least that he did in fact witness all the signatures on the petition.

16. However, we have other reasons for concern. As we noted previously, Mr. Fiorini was a supervisor in this plant until approximately one and a half years ago. At that time, a new owner took over the operation and Mr. Fiorini requested that he no longer be a supervisor.

17. When he became a member of the bargaining unit, his salary was maintained at the level he had as a supervisor. He also appears to have more flexibility in his working hours than most other employees as he was able to take long lunch hours to meet with his lawyer on at least two occasions. Seven of the people who signed the petition were supervised by Mr. Fiorini when he was a supervisor. Indeed, we conclude, in spite of Mr. Fiorini's prevarication on this point, that all of the people he formerly supervised signed the petition.

18. Mr. Fiorini often eats lunch with the other supervisors because of his former position, although he also eats lunch with members of the bargaining unit as well. When Mr. Fiorini was a supervisor, on occasion he was sent by the plant manager to other jewelry manufacturers to pro-

vide advice and assistance. After he became a member of the bargaining unit, he and his own supervisor, Reno Pontello, continued to make similar trips. Mr. Fiorini agreed that he and Mr. Pontello were "good buddies". Mr. Pontello relies on Mr. Fiorini's expertise and experience, and they frequently eat lunch together in the plant lunchroom. Sometimes three other friends of Mr. Fiorini who are in the bargaining unit eat with them. Occasionally Mr. Fiorini and Mr. Pontello go out to lunch together, a fact which is known to other employees. Mr. Fiorini agreed that other employees saw him as an employee with particular experience and expertise.

19. Under section 57 of the *Labour Relations Act*, the Board must satisfy itself that the petition supporting a termination application represents the voluntary wishes of those who signed it. The Board's approach is described in *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235 at p. 240:

The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 62 CLLC ¶16,264:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly accurately reflects the voluntary wishes of the signatories.

and in the *Peel Block Co. Ltd.* case, 63 CLLC ¶16,227:

It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.

See also *CCH Canadian Limited*, [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear or reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) [now section 57(3)] of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement in opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting trap for those very employees trying to express themselves. At all times a balance must be struck.

20. In *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. March 319, the Board noted the significance in this context of a petitioner's personal relationship with a member of management at p. 322 (and see as well *Patro D'Ottawa*, [1984] OLRB Rep. May 741):

16. The Board has indicated in a number of cases that a petitioner's personal relationship with a member of management and the awareness of this relationship by employees in the bargaining unit are factors to be considered in assessing whether or not the signatures expressed the true wishes of the employees who signed. See for example *Labatts Ontario Breweries*, [1985] OLRB Rep. March 433; *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690; *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877; *Jean Marc Joannis*, [1983] OLRB Rep. Jan. 92.

21. There was no evidence of any impropriety or wrongdoing on the part of the employer in the facts before us. However, we find it likely that employees would reasonably perceive Mr. Fiorini as closely associated with management and would be concerned that management would come to know whether they had signed the petition or not. He is a former supervisor who retains an anomalous position in the plant and who is known to have a close working relationship with at least one other supervisor. This identification with management would be particularly strong for those employees previously supervised by Mr. Fiorini.

22. We note as well that the pattern of employee support for the termination petition was unusual. There appeared to be none of the campaigning or discussion which usually proceeds this kind of application. Indeed, there was no discussion of the application or petition with any employees by Mr. Fiorini prior to the meeting except for the simple notification of the meeting. There was no discussion or debate at the meeting and employees signed immediately upon entering the banquet room.

23. There are a number of possible explanations for this atypical pattern of events. However, in the context of the evidence before us, we find it consistent with our conclusion that employees may well have signed the petition because they were concerned management would come to know of their decision one way or another, rather than, for example, an instant grounds-well of anti-union sentiment.

24. Our concern in this regard is reinforced by the patent unreliability of Mr. Fiorini's testimony, which was the only evidence tendered by the applicants. In addition to the defects in the manner of his testimony described earlier, there were a number of unexplained inconsistencies in his evidence, reflecting a gap between his conduct and his self-professed ignorance of labour relations.

25. While each of these points in isolation may not be insurmountable, their cumulative effect is to cast doubt on the voluntariness of the petition. Taking the evidence as a whole, we are

not satisfied that the applicants have discharged the onus of proving on the balance of probabilities that the petition represents the voluntary wishes of employees.

26. This application is dismissed.

2307-85-U United Brotherhood of Carpenters and Joiners of America Local Union 93, Complainant v. Andre Roy and Labourers' International Union of North America, Local 527, Respondents

Intimidation and Coercion - Remedies - Unfair Labour Practice - Labourers' Union representative making statement to carpenters performing concrete forming on residential job site that they must join the Labourers' Union to continue working on the job - Conduct amounting to intimidation and coercion in circumstances - Labourers' Union jointly responsible with employer for the damages arising from carpenters being removed from the job site

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *J. Wilson* and *B. L. Armstrong*.

APPEARANCES: *Dennis J. Power* and *Wilf Chretien* for the complainant; *S.B.D. Wahl*, *A. Roy* and *B. Carrozzi* for the respondents.

DECISION OF THE BOARD; March 26, 1987 as amended April 15, 1987

1. This is a complaint under section 89 of *The Labour Relations Act* in which the complainant alleges that the respondents have violated sections 3 and 70 of the Act. At the hearing into this matter the complainant relied only on the alleged breach of section 70. That section provides as follows:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

2. The complainant, hereinafter referred to as the "Carpenters Union", is a local of the United Brotherhood of Carpenters and Joiners of America with jurisdiction in the Ottawa area. The respondent, the "Labourers Union", is a local of the Labourers International Union of North America with jurisdiction in both Ottawa and Hull, Quebec. In recent years, the two unions have been rivals, particularly with respect to employees engaged in concrete forming in the residential sector of the construction industry. Historically, the Carpenters Union has represented carpenters engaged in the building and repair of forms. The Labourers Union, however, has sought to become bargaining agent for employees engaged in form work, including persons it classifies as "formsetters" who build and repair forms. By way of this complaint, the Carpenters Union contends that Andre Roy, a representative of the Labourers Union, sought by intimidation or coercion to compel certain carpenters working on a residential project in the employ of Mega Concrete Forms Ltd./Mega Beton Ltee, ("Mega") to become members of the Labourers Union. It is submitted that Mr. Roy did so by advising the carpenters that they would have to join the Labourers Union to continue working on the site. Mr. Roy denies making such a statement. The carpenters

did not join the Labourers Union. The following day the carpenters were removed from the job site. Shortly thereafter, the carpenters were assigned by Mega to a non-residential project.

3. The Carpenters Union contends that Mega's action in removing the carpenters from the job site was the result of Mr. Roy's conduct, and it seeks compensation for the individuals involved from the Labourers Union. It also seeks damages for its other members who, it contends, would have been employed by Mega had Mr. Roy not engaged in the conduct complained of. The Carpenters Union makes no complaint concerning Mega itself. At the commencement of the hearing, counsel for the Labourers Union submitted that only the management of Mega could have removed the carpenters from the job site, and accordingly the complaint should have been brought against Mega, or at the very least, Mega should have been named as one of the respondents. Counsel further contended that since Mega had not been named as a respondent, the Board should decline to entertain the complaint. The Board orally rejected this contention. It was open to the Carpenters Union to decide which potential party or parties to name as a respondent. It was under no obligation to name all those who might be proper respondents.

4. Mega is based in Hull, Quebec. Under the laws of that province, all construction employees in Quebec must belong to one of the recognized construction trade unions, although no union has exclusive bargaining rights. At the relevant time, a number of labourers in the employ of Mega in Quebec belonged to the Labourers Union. Certain others belonged to a union affiliated with the Quebec Federation of Labour. Prior to the events described below, no union held bargaining rights with respect to Mega's employees in Ontario, and none of its Ontario employees were required to belong to a trade union.

5. Mega's first Ontario job involved the concrete forming for an apartment building on Emmerson Street in Ottawa. The general contractor on the project was Uniform Developments Limited which had a collective agreement with the Labourers Union. This agreement apparently covered only labourers and not "formsetters". The agreement required that Uniform sub-let work covered by the agreement to firms in contractual relations with the Labourers Union. When Mr. Roy became aware of the fact that Uniform had sublet work to Mega, he made contact with the company. The company asked if it would be able to transfer some of its Quebec employees to Ottawa. Mr. Roy indicated that this would not be a problem.

6. On September 30, 1985, Mr. Roy and Mr. B. Carrozzi, another official of the Labourers Union, met with Mr. M. Labrosse and Mr. J. Trembly, two officials of Mega. During this meeting, the company signed a collective agreement covering labourers. Mr. Roy raised the possibility of the company also signing a formwork agreement encompassing formsetters within its scope. The officials of Mega, which in Quebec employed carpenters to build forms, indicated that they were not prepared to immediately sign such an agreement, but they did ask if the Labourers Union could supply the company with formsetters. Mr. Roy replied that it probably could. In November or early December of 1985, Mega advised the Labourers Union that it would not sign a formwork agreement. Mr. Roy acknowledged, however, that at the time of the events described below, it was still his hope that the company would sign such an agreement.

7. Officials of Mega were also in contact with the Carpenters Union, asking the Union to refer men to the Emmerson job. Mega also transferred to the job certain carpenters from Quebec, at least some of whom were members of the Carpenters Union. On October 2, 1985, there were apparently five carpenters at work on the Emmerson Street job as well as one labourer. Mr. Wilf Chretien, the business representative of the Carpenters Union, visited the job site that day and at his request all of the carpenters present signed documents evidencing their membership in the Carpenters Union.

8. On October 3, 1985, Mr. Roy and Mr. Carrozzi attended at the Emmerson Street job site. Mr. Roy testified that it had been agreed between himself and Mega that labourers from Quebec would go to the union hall before starting work. That however, did not occur, but rather, according to Mr. Roy, Mega left a message for him to meet the employees on the job site and also bring along two formsetters. The Labourers Union had only one formsetter available, namely Mr. Daniel Ruel, whom Mr. Roy asked to attend at the job site on October 3rd. Mr. Ruel went to the site accompanied by his brother, Mr. Jean Ruel, a labourer who was looking for work.

9. Mr. Roy, Mr. Carrozzi and the Ruel brothers arrived at the Emmerson Street job site about 7.00 a.m. What happened after they arrived is in dispute. Three of the carpenters on the site, namely Sylvain Beauchamp, Jacques Meloche and Bernard Horth, testified that Mr. Roy advised the carpenters that they had to join the Labourers union for \$50.00 to continue working on the site. Mr. Meloche further testified that Mr. Roy stated that the carpenters had to join the Labourers Union because the company had an agreement with the union. Neither Mr. Beauchamp nor Mr. Horth referred to an agreement in their testimony, although according to Mr. Horth, Mr. Roy stated that the Labourers Union had control of the job. Mr. Horth further testified that he and Mr. Roy discussed the fact that Mr. Horth had at one time been a member of the Labourers Union while working as a form setter with another company. Mr. Horth indicated that he advised Mr. Roy that he did not want anything further to do with the Labourers Union.

10. Mr. Roy's version of the discussion was quite different. According to Mr. Roy, he spoke only to Mr. Horth, although he acknowledged that the others present could have overheard their conversation. Mr. Roy testified that he did not say that the Labourers Union had a collective agreement covering the work and did not indicate they were required to join the Labourers Union. According to Mr. Roy, Mr. Horth asked him if it still cost \$50.00 to join the formsetters, and he replied that he did. Mr. Roy testified that he did refer to a collective agreement, but only to a young man he knew to be a labourer from Quebec, at which point Mr. Horth stated that the individual in question should not join the Labourers Union.

11. It will be recalled that the two Ruel Brothers attended on the job site on October 3rd. They did not participate in the discussion with Mr. Roy, but were close enough to hear what was said. Daniel Ruel testified that Mr. Roy did not tell anyone that they had to join the Labourers Union and did not mention either \$50 or a labourers collective agreement. Mr. Ruel did testify, however, that at one point Mr. Roy commented that the rate on the job was \$16.00 and that his formsetters work for \$16.00, at which point Mr. Horth stated he would not work for \$16.00. According to Mr. Ruel, Mr. Roy replied that here it is formsetters at \$16.00 per hour. Daniel Ruel recalled that the carpenters on the job insisted they would not work for \$16.00 per hour. Jean Ruel also testified that Mr. Roy did not say that the carpenters had to join the Labourers Union or that he had mentioned a figure of \$50.00. In cross-examination, Jean Ruel was asked if there had been a discussion about \$16.00. Initially he denied that there had been. Subsequently he said he was not sure. When advised of his brother's testimony regarding the reference to \$16.00, Jean Ruel indicated that he now seemed to recall such a discussion.

12. Subsequent to the discussion described above, Mr. Labrosse and Mr. Tremblay from Mega, spoke to the carpenters on the site. According to Mr. Beauchamp, Mr. Labrosse arrived near the end of Mr. Roy's discussion with the men, and stated that the labourers had a collective agreement with Mega on the job, and that the men had to join the labourers union. Mr. Beauchamp testified that subsequently Mr. Tremblay arrived and indicated that those who did not want to join the Labourers Union could work on other company sites. When questioned about the presence of management, Daniel Ruel indicated that he recalled only Mr. Tremblay being present, and that he did not hear Mr. Tremblay say that the carpenters must belong to the Labourers Union. At

one point in his testimony Mr. Roy stated that Mr. Labrosse told the men that the company was undecided about the matter, but if it did decide to go with labourers on the formwork, then everyone would have to join the Labourers Union. Earlier in his evidence, however, Mr. Roy claimed that Mr. Labrosse had said that he wanted to try the formsetters, to which the men said they would not work with formsetters. According to Mr. Roy, Mr. Labrosse told the carpenters to make up their minds and say whether or not they were going to work, to which Mr. Horth replied there was no way they would work with the Labourers Union. Mr. Roy testified that Mr. Tremblay then arrived and after a discussion with Mr. Labrosse told the men that they should either go to work or leave the site.

13. Following a discussion among themselves, three of the carpenters, namely Mr. Beauchamp, Mr. Horth and Mr. Meloche, left the job site to go to the Carpenters Union hall. Although Mr. Meloche testified that this course of action was proposed by Mega's site foreman, the evidence of the other two employees indicates it was their own idea, and that they simply informed the foreman that they were leaving. Two other carpenters also left the site. The evidence suggests that they returned to their homes in Montreal. When Messrs. Beauchamp, Horth and Meloche arrived at the union hall, they advised Mr. Chretien of what had occurred. Mr. Chretien told them to return to the job site. The three men did so, and were permitted to return to work. By the time they returned, the two Ruel brothers were working on the site. Both groups of employees worked on the site for the remainder of the day.

14. Near the conclusion of the work day on October 3, 1985, the site foreman advised Messrs Beauchamp, Horth and Meloche that they were not to report for work the following day, which was a Friday. The three men were subsequently advised to report to another Mega job in the Ottawa area this one in the industrial, commercial and institutional sector, on Monday, October 6, 1985. The Ruel brothers continued to work on the Emmerson Avenue site. The following week they were joined by a number of other employees, including formsetters referred to the site by the Labourers Union at Mega's request. Mr. Roy was asked by counsel for the Carpenters Union why the carpenters had been laid off by Mega. Mr. Roy responded that he did not know, but suggested that they may have quit rather than work alongside formsetters belong to the Labourers Union.

15. On October 2, 1985, the day Mr. Chretien visited the job site, the Carpenters Union filed an application to be certified to represent carpenters and carpenters apprentices in the employ of Mega. In support of its application, the union filed the membership evidence collected by Mr. Chretien. The Labourers Union subsequently intervened in the application. The intervention was filed by Mr. D. Strang, an official of the Labourers Provincial District Council, apparently because officials of the Ottawa local of the Labourers Union, including Mr. Roy, were attending a conference in Hawaii. The Carpenters Union retained legal counsel to represent it in connection with the application, something it would not have done had the Labourers Union not intervened. Upon Mr. Roy's return to Ottawa, however, the Labourers Union withdrew its intervention. On November 25, 1985 the Board issued a certificate to the Carpenters Union. On November 27th Mega and the Carpenters Union entered into a collective agreement.

16. We start our analysis of the merits of the complaint with a review of the legal situation as it existed in early October, 1985. The Labourers Union was party to a collective agreement with Mega covering labourers. The agreement did not, however, cover carpenters or formsetters. The Carpenters Union had no agreement with the company. Accordingly, Mega was not restricted as to who it could hire to build forms. The company hired certain carpenters through the Carpenters Union to build forms, but was actively considering the use of formsetters supplied through the Labourers Union. As of October 3rd, however, Mega and the Labourers Union were not in a legal position to sign a formwork agreement because as of that date a majority of the company's existing

employees who would be covered by such an agreement were not members of the Labourers Union. Two obvious ways existed to alter this situation, namely to have the current employees become members of the Labourers Union or to replace those employees with individuals belonging to the union. At the hearing, counsel for the Labourers Union contended that in an attempt to keep open the possibility of signing a formwork agreement, Mega followed the latter approach, namely replacing the then - existing employees with members of the Labourers Union. Counsel contended that while this may have involved a breach of the Act on the part of the company, there was no breach on the part of the Labourers Union or Mr. Roy. In support of this contention counsel noted that at the relevant time it was not improper for Mr. Roy to attempt to convince the company to hire members of the Labourers Union. As already noted, the position of the Carpenters Union is that Mr. Roy sought to coerce or intimidate existing employees into joining the Labourers Union.

17. In that Mega was not named as a respondent in these proceedings, we can make no findings or orders binding on the company. The issue before us is whether Mr. Roy and through him the Labourers Union violated the Act. Mr. Beauchamp, Mr. Horth and Mr. Meloche all testified that Mr. Roy stated that they must join the Labourers Union in order to work on the Emerson site. Mr. Roy denied that this was the case. One difficulty with Mr. Roy's evidence is that although he claimed that his purpose for being on the job site was to talk with certain labourers from Quebec, it is clear that he spent considerable time talking with the carpenters. Further, Mr. Daniel Ruel, himself a member of the Labourers Union, testified that although he did not hear Mr. Roy tell the carpenters they had to join the Labourers Union, he did state that if the carpenters did not want to work for \$16.00 they did not have to work, and further that here it is formsetters. Jean Ruel also acknowledged that there had been a discussion about \$16.00. Although the Ruel brothers both testified that there had not been any mention of \$50.00, Messrs Horth, Beauchamp and Meloche as well as Mr. Roy all testified that reference was made to \$50. Mr. Roy stated that Mr. Horth raised the issue by asking if it still cost \$50 to join the Labourers Union. Given Mr. Horth's opposition to the Labourers Union, which Mr. Roy acknowledged, it seems unlikely that Mr. Horth would have asked such a question. We believe the evidence of Messrs Horth, Beauchamp and Meloche on point to be more reasonable, and accept that they were told by Mr. Roy that they would have to join the Labourers Union for \$50 to continue working on the job site. There was, in fact, no collective agreement in force which required such a result.

18. Section 70 of the Act prohibits any person or trade union from seeking by intimidation or coercion to compel a person to become a member of a trade union. We view Mr. Roy's statement to employees that they must join the Labourers Union to continue working on the Emerson job as an attempt to intimidate them into joining the union. While no one was in fact intimidated into joining the Labourers Union, an offence was committed once the attempt was made. See: *Intermodal Marine Surveys Ltd.* [1979] OLRB Rep. Ap.321 and *Saverio A. Greco* [1976] OLRB Rep. June 323.

19. The Carpenters Union seeks compensation for Messrs. Beauchamp, Horth and Meloche. Part of the compensation claim relates to the two hours that they did not work on Thursday, October 3rd due to their visit to the Carpenters Union hall. As already noted, we are satisfied that no one directed the men to leave their jobs. They did so on their own volition in order to advise the Carpenters Union of what had happened. It was quite reasonable for them to contact the Carpenters Union. However, they could have done so subsequently at a more appropriate time, rather than simply walking off the job site. In these circumstances we are of the view that the three employees did not suffer any monetary losses on October 3, 1985 as a direct result of the activities of Mr. Roy.

20. The situation with respect to Friday, October 4, 1985, is quite different. Messrs. Beauchamp, Horth and Meloche did not work that day, and hence were without the wages they would otherwise have received. At issue is whether Mr. Roy and the Labourers Union were in some way responsible for this situation. It was Mega's foreman who actually directed that the men not to report to work. Nevertheless, the evidence taken as a whole, including the presence of Mr. Labrosse near the conclusion of Mr. Roy's comments on October 3rd, and Mr. Roy's presence while the management officials spoke, indicates the existence of an understanding between Mr. Roy and the officials of Mega. This conclusion is supported by the fact that the very consequence Mr. Roy warned the men of if they did not join the Labourers Union - namely not being able to work on the Emmerson job - was carried out by Mega's management. Given these considerations, we believe that Mega and the Labourers Union were likely acting in concert, and that Mr. Roy's threats and their fulfilment by Mega management were part of a jointly orchestrated plan. In these circumstances, we are satisfied that the Labourers Union bears joint responsibility with the company for the removal of Messrs. Beauchamp, Meloche and Horth from the job site, and accordingly should compensate them for their resulting losses.

21. The Carpenters Union also claims damages for others of its members, claiming that had the carpenters not been removed from the Emmerson project, Mega would have employed additional carpenters. This essentially amounts to a claim that had Mr. Roy not acted unlawfully, the company would have hired additional men through the Carpenters Union. We are not able to accept this contention. At the relevant time Mega had no contractual relationship with the Carpenters Union and was under no obligation to hire employees through that union. Until November 28th, the company was free to hire additional employees from any source, including the Labourers Union, and to transfer employees between job sites. Accordingly, it cannot be said with any degree of assurance that other members of the Carpenters Union lost employment opportunities on account of Mr. Roy's unlawful conduct.

22. The Carpenters Union seeks compensation for its legal fees in connection with its application for certification, relying on the fact that it only retained counsel because the Labourers Union intervened in its application. We are not satisfied that there was anything unlawful about the Labourers Union intervention, however, and accordingly do not regard it as an appropriate basis for a compensatory award.

23. Having regard to the above, the Board finds that Mr. Roy, and through him the Labourers International Union of North America Local 527, breached section 70 of the Act. Mr. Roy and the union are directed to cease seeking by intimidation to compel persons to become members of the union. Mr. Roy and Labourers International Union of North America, Local 527, are directed to compensate Mr. Horth, Mr. Beauchamp and Mr. Meloche for their lost wages and benefits related to October 4, 1985.

24. The Board will remain seized of this matter in the event the parties are unable to agree on the amount of compensation payable.

1104-83-U Gerald Lecuyer, Cash Podlewski and John Polhill, Complainants, v. Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, Respondents, v. Abitibi-Price Inc., Intervener

Arbitration - Duty of Fair Representation - Practice and Procedure - Remedies - Unfair Labour Practice - Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant - Board hearing merits of grievance - Rules applicable to court proceedings used to calculate interest on lost wages - Costs denied

BEFORE: *Owen V. Gray*. Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

APPEARANCES: *F. J. W. Bickford, J. D. Polhill, C. W. Podlewski* and *Gerald A. Lecuyer* for the complainants; *W. Dubinsky, J. R. McInness, Martin Brindley* and *Dick Facca* for the respondents; *D. W. Brady, A. Shields, R. Dixon* and *O. Halushak* for the intervener.

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN; December 29, 1986

[When this decision was originally published in the January Report, the opinion of Board Member L. C. Collins was inadvertently omitted. The complete decision follows: Editor]

I

1. The matters dealt with in this decision arise out of the majority decision in this matter dated July 23, 1985, now reported under the name *Gerald Lecuyer*, [1985] OLRB Rep. July 1099, and hereafter referred to as "the initial decision." The nature of the complaint in this matter was described in paragraph 1 of the initial decision:

The three complainants are skilled tradesmen employed by Abitibi-Price Inc. ("Abitibi") in the mechanical department of its Mission Mill ("the Mill") at Thunder Bay. At all times material to this proceeding, the terms and conditions of their employment and that of other Mill employees were governed by a collective agreement between Abitibi and "the Canadian Paperworkers Union, CLC and it's [sic] Local 132" (referred to here, as in the collective agreement, as "the Union") with effect from May 1, 1982 to April 30, 1984. Beginning in July, 1982, there were several occasions on which employees were selected for short-term layoff from their regular jobs on the basis of their length of service at the Mill ("mill seniority"). The complainants and others in the mechanical department felt such layoffs violated the terms of the collective agreement, which in their view required that selection of employees for layoff from their regular jobs be based on length of service in the department concerned ("departmental seniority"). The complainants attempted to grieve the effects and potential effects on them of the company's reliance on mill seniority in effecting layoffs in July, 1982 and thereafter. The union, however, refused to accept or present some of their grievances; the others of those grievances were not taken beyond the first step in the grievance procedure, where they were denied by the employer. The complainants say that the Union's treatment of them and their grievances violated sections 68 and 70 of the *Labour Relations Act*...

2. The initial decision found that through certain acts and omissions of Ron Balina, the then President of Local 132, the respondents had acted in a manner which was both arbitrary and in bad faith in representing the complainants, and in so doing had violated section 68 of the Act. In refusing to process the complainants' grievances, Balina had told the Local's membership that a similar grievance ("the Landversitch grievance") had been denied by the company at Step 2 on the basis that there was no violation of the collective agreement. In fact, that had not been the company's response. Its response had been that, in the past, departmental seniority had indeed been the basis on which employees had been selected for layoff and mill seniority had only provided an employee with access to "bottom jobs" in other departments in the mill once that employee was

laid off from his own department on the basis of departmental seniority. In its step 2 response to the Landversitch grievance, the company had gone on to say:

... however, since Mr. Balina indicated agreement with the Company's procedure and since he has taken the position that it should continue in the future, the Company will not amend this practice unless Mr. Balina, on behalf of Local 132, indicates a desire to handle future situations on a departmental seniority basis.

Balina had withheld this response from the membership. He had also withheld from the membership a letter written to him by the mill manager reiterating the company's position that the use of mill seniority in determining order of layoff had been and would be solely the result of Balina's having asked the company to take that approach, and that the company would revert to the use of departmental seniority if the union so requested. In short, Balina had told the complainants and the membership that the company was resisting the complainants' claim when, in fact, it was he whose resistance was responsible for the failure of their grievances. Within the local union, it was well understood that its officers could not change the collective agreement except through collective bargaining which, by union custom, would require membership approval of any proposed amendment before the union could present it to the employer. Any resort the complainants might otherwise have been able to make to this rule or to internal union procedures was undermined by Balina's misrepresentations to the membership about the company's interpretation of the collective agreement in its answer to the Landversitch grievance. While other facts contributed to the finding that Balina's behaviour resulted in violation by the respondents of section 68, the facts just recited are particularly important to an understanding of the approach we have taken to formulation of a remedy in this matter.

II

3. The major remedy sought by the complainants was a direction that the respondents take the complainants' grievances to arbitration. The initial decision expressed concern about the propriety of that remedy in the particular circumstances of this case. After reviewing the Board's jurisprudence with respect to referral to arbitration, the initial decision made these observations:

79. This case differs from those in which the Board has directed that the trade union and employer process the complainants' grievance to arbitration. The fundamental difference is that the underlying dispute is not between complainants and their employer; the real dispute is internal to the union. If the union had decided to advocate the complainant's interpretation of the collective agreement, the evidence now before us suggests very strongly that Abitibi would have accepted and acted on that interpretation. As a result, when assessing the damages to the complainants which result from the union's breach of the Act, the likely outcome of a grievance supported by the union is a much less critical contingency than the question whether the union would have decided to support the grievance if it had dealt with that question in a manner which was not arbitrary, discriminatory or in bad faith.

80. With the possible exception of the layoffs in July, 1982, the layoffs which the complainants wish to challenge at arbitration were carried out in accordance with a procedure the employer adopted or continued at the union's request. A challenge in the union's name to the employer's use of that procedure after that request was made and while it remained outstanding would surely be answered with the defence that the union is estopped from challenging the procedure it approved in the October meeting on the Landversitch grievance. It would clearly be unfair for us to fashion a remedy which exposes the employer to liability to the complainants for the adverse consequences to them of a layoff procedure requested by their union. If we were to direct arbitration and require that the employer not raise the estoppel defence, then we would also have to direct that the union bear liability for any damages awarded in arbitration with respect to claims against which the estoppel defence would have been successful. This would leave Abitibi with no reason to resist the position which our order would permit the complainants to assert in the union's name, unless we were also to take up Abitibi's rhetorical request

that we tell it what position to take if we direct a referral to arbitration. This all seems a highly artificial and unsatisfactory way to assess damages for which only the union would ultimately be responsible.

81. The dynamics of an arbitration with respect to the July, 1982 layoffs might be different. We have not heard Abitibi's version of the discussion about mill seniority at the union-management meeting of June 23, 1982, and do not know whether a challenge to the July layoffs might be met with an estoppel defence arising from that discussion. Even assuming that it would not, Abitibi's second step answer to the Landversitch grievance does not leave much room for dispute in an arbitration in which the position taken in the name of the union is the same as the position set out in the second paragraph of Abitibi's letter.

82. In short, with the possible exception of losses resulting from the July, 1982, layoffs, it is the union, and not the employer, that will be liable for any damages to which any of the complainants can show they are entitled for layoff out of seniority. Whatever value an arbitration between the employer and the complainants acting in the name of the union might have in assessing whether Abitibi should pay damages to Podlewski in respect of the July, 1982 layoffs, that procedure could not be expected to fairly assess the contingencies which affect an assessment of the union's liability to the complainants for damages in respect of any of the other layoffs. For all these reasons, we doubt whether any direction to proceed to arbitration should form part of the remedy in the circumstances of this case, and we are certain it should not be the means by which the union's liability for damages is ascertained.

83. Accepting at face value the union's claim that its object in deciding whether to support the complainants' position was to act in a manner consistent with the language of the collective agreement and the parties' past practice, one way to determine the appropriate remedy for the union's breach might involve a determination by this Board of the meaning of the collective agreement. This could not and would not be done without first hearing any evidence or argument which any of the parties wish to add to what we have already heard. If we were to find in favour of the complainants' interpretation, we would then go on to assess the damages payable by the union with respect to layoffs after July, 1982, and to determine whether either the union or the employer is responsible for any loss in respect of the July, 1982 layoffs.

4. As the parties' arguments had not addressed the possible alternatives to a referral to arbitration, the initial decision went on to request their submissions on that matter in writing. The written submissions on behalf of the complainant employees and intervener employer supported the approach described in paragraph 83 of the initial decision. The respondents, however, opposed that procedure on several grounds. The first was that it would be unfair for this panel to hear evidence with respect to the meaning of the collective agreement because:

The evidence that will be tendered, might very well be tendered by some of the same witnesses who have already adduced evidence before this tribunal.

The tribunal has expressed some comments either directly or indirectly as to the motives and relationships that the tribunal has interpreted as affecting the relationships between the Parties. By implication, this may be interpreted by the Parties as reflecting upon credibility. Having done so, it is our submission that it would be unfair to the Parties to have this Board now determine the issue on the merits.

This submission is without merit. The Board quite regularly bifurcates its hearings with respect to the issues in proceedings before it. The most frequent bifurcation involves hearing only evidence with respect to liability to pay compensation for any losses suffered by a complainant, while deferring the hearing of evidence with respect to the quantum of the complainants' loss and retaining jurisdiction to do so later should that be necessary. When the Board does have to hear evidence with respect to quantum, the witnesses involved in giving that evidence are often the same witnesses who have given evidence with respect to the liability issue, and the Board's earlier observations with respect to their credibility are no less relevant when assessing the credibility of their evidence with respect to quantum than they would have been had evidence with respect to both

liability and quantum been heard together in a single hearing. As it could hardly be suggested that the Board would be acting unfairly if a single panel heard all of the evidence with respect to all of the issues raised in proceedings before it in a single hearing, I am unable to see how a single panel's conducting the second of two hearings on suitably bifurcated issues can be unfair.

5. Counsel for the respondents also observed, as did the initial decision, that the Board's decision in *Massey Ferguson Industries Limited*, [1977] OLRB Rep. April 216, stated that referral to arbitration was the approach the Board intended to take thereafter, and that the Board had taken that approach in most subsequent cases. He then made this submission:

The events which gave rise to this complaint occurred in 1982 and thereafter. In fact, the circumstances in the Union have changed considerably in the past three years. As the events would disclose, Mr. Ron Balina is no longer the President of the Union. Making note of the Board's comments concerning the "ill will" that Balina had towards Podlewski, one could conclude that that "ill will" has now been removed. In view of the Board's policy and the change in circumstances that now exist, we would urge upon the Board to make a decision to direct that the Parties proceed to Arbitration before a tribunal constituted pursuant to the provisions of the Collective Agreement.

Counsel's submissions did not address the distinctions which the initial decision drew between the peculiar circumstances of this case and the circumstances which existed in those cases in which the Board did grant a direction that the complainants' grievance be taken to arbitration. What counsel seems particularly to have overlooked in his submissions is that a trade union directed to take a complainant's grievance to arbitration is ordinarily obliged to support the complainant's position at arbitration. Indeed, the usual order directs that the trade union retain counsel satisfactory to the grievor to present the grievor's case at arbitration. The role at arbitration of counsel so retained was described in paragraph 8 of the Board's decision in *Central Stampings Limited*, [1984] OLRB Rep. Oct. 1383:

... The provision in the Board's original decision for the selection of counsel on a joint basis clearly contemplated that counsel would pursue without distraction the interests of the complainant with respect to the handling of his grievance. This became necessary because the Board's apportionment of liability created the unusual situation of the trade union having an interest diametrically opposite to the member on whose behalf it had been directed to advance the grievance. To eliminate even the perception that the trade union might, in light of this conflict, not be doing its utmost for the grievor at arbitration, the grievor was given the right to select an advocate in whom he had confidence. Because the trade union continued to be responsible for the legal fees incurred in presenting the arbitration, however (as it would have been had it not "arbitrarily" withdrawn the grievance in the first place), the Board gave the trade union the right to approve the complainant's selection of counsel as well. Counsel is not, however, meant to be placed thereby in a position where he serves two masters - that would resurrect precisely the kind of conflict situation that the choice-of-counsel provision was meant to eliminate. Rather, the counsel so selected is expected to all at all times in the interest of the grieving employee, ...

In other words, the usual order gives a successful complainant the right to assert his or her own position on the subject matter of the grievance at arbitration in the name of the union at the union's expense. As counsel retained to present that position would be acting in the name of the union at arbitration, it is difficult to see how any one else purporting to speak for the union could have standing in the arbitration proceedings to take any position inconsistent with that asserted by that counsel. As was observed in the initial decision, this is not an unreasonable arrangement for the resolution of the merits of the underlying representational question in respect of which the union has been found to acted contrary to section 68, if that underlying question is essentially a dispute between the employer and the complainant/grievor. Here, however, the underlying representational question was a dispute over the meaning of the collective agreement between the complain-

ants and the union official who was in *de facto* control of all the mechanisms by which that dispute might have been resolved. The employer appeared to favour the complainants' interpretation, but had been prepared to abide by the union official's request that his interpretation be followed because he had ostensible authority to speak for the union. The observation of the initial decision was that a referral to arbitration in which the employer's interpretation and that of the complainants might be the only positions which could be advanced would not, from the union's perspective, be a fair way to determine the underlying question and assess damages which would ultimately be borne either in whole or in large part by the union. The submissions of counsel for the union did not alleviate my own concern in that regard.

6. Finally, counsel for the union made the following submissions:

If in fact the Board is considering a remedy that is entirely an alternative to any referral to arbitration, then we would direct the Board to recall the real issue that existed in the grievances that were in fact filed. The issue was, and appears to remain, as to whether mill seniority or departmental seniority, is paramount when a layoff occurs.

Is this an issue that should be settled by a Board of Arbitration? Or by a Labour Relations Board? In fact, is this not an issue that should be determined by the Parties through negotiations? If it is to be determined through negotiations, should not the membership of the whole Local determine the position they desire to have their Union take?

The alternative to arbitration of a number of grievances would appear to be a Direction to the Parties to direct their minds to the wording in the Collective Agreement. We suggest that the Board consider directing the Union to hold a vote by secret ballot to determine what position the Union should take on the matter of mill seniority versus department seniority, and to be guided by the results of that referendum in determining the course that it will follow in the next round of negotiations.

I agree with counsel that the issue at the time of the violations was "whether mill seniority or departmental seniority *is* paramount when a layoff occurs", having regard to the provisions of the collective agreement and the past practice in the applying that collective agreement at the Mission Mill as of the time the Act was breached. That is the way the complainants defined the issue at that time, and it is also the way the then president of the local defined the issue. Significantly, the issue was never defined as "whether mill seniority or departmental seniority *ought to be* paramount when a layoff occurs", which is, in essence, the question counsel suggests be put to a vote of the local union's membership as a remedy for the respondents' breach of the Act. Both sides in the debate over the meaning of the collective agreement and the nature and consequences of past practice in the mill at all material times insisted that the existing rule, whatever it was, could not be altered except through collective bargaining, and that the union could not seek a different rule in collective bargaining without the express authority of a resolution of the membership. Each side maintained that the other's position could not be advanced in the union's name without such a resolution of the membership, and each side took comfort in the fact that the other had not sought such a resolution. Each side recognized the disadvantage it would have if it was seen as advocating a change in the accrued rights and privileges attaching to each form of seniority. As a practical matter, each side chose to focus on what the rule then was and avoid debate over what it ought to be. In effect, the debate was over the proper outcome of an adjudication of the meaning of the existing collective agreement, not over the more complex question of the balance which ought to be struck between competing interests in determining what provisions ought to be sought in collective bargaining.

7. As a result, the remedial problem was similar to that encountered in cases in which the respondent trade union maintains that a complainant's grievance ought not to have been taken to arbitration because the grievance lacked merit. To paraphrase what was said at paragraph 78 of the

initial decision, where the likely result of an assessment of the complainant's rights under the collective agreement is the critical contingency in an assessment of the loss the complainant had suffered as a result of the union's having made its decision in an improper manner, there is an obvious logic to assessing that contingency by actually adjudicating the complainant's rights under the collective agreement. A vote of the membership does not seem an appropriate forum for such an adjudication, having regard to the conflict of interest created by the fact that the union's exposure to liability would hinge on its membership's decision. The fact that Mr. Balina is no longer the President of the local makes it no less difficult to imagine that a decision by the membership about the meaning of the collective agreement would not be influenced by the fact that acceptance of the complainants' interpretation might result in depletion of union funds to pay damages to the complainants, whereas a contrary decision would not.

8. In the result, having considered the submissions of the parties, each of the members of this panel concluded that the approach suggested in paragraph 83 of the initial decision should be followed in this case, giving the complainants, the trade union and the employer all the opportunity to participate in an adjudication of the meaning of the collective agreement for the limited purpose of assessing the remedy to which the complainants were entitled with respect to the trade union's of section 68 of the *Labour Relations Act*. The parties were so advised by decision dated August 29, 1985, which directed that the matter be relisted for hearing at the earliest practicable date. Having regard to this panel's availability and the desires of the parties for accommodation of the availability of their counsel, the earliest practicable dates were April 3 and 4, 1986. On those dates the panel heard such evidence and argument as the parties wished to add to what we had already heard with respect to the interpretation of the collective agreement and any other matter relevant to outstanding remedial issues.

9. Before turning to the results of the April hearings, I think it important to note that my decision to consider the meaning of the collective agreement in order to devise an appropriate remedy in this case does not signal abandonment of the general approach to section 68 complaints contemplated by the decision in *Massey Ferguson Industries Limited, supra*. In that decision, the Board settled two policies with respect to its adjudication of complaints which allege that the respondent trade union breached section 68 of the Act by or in the course of deciding not to take the complainant's grievance to arbitration. The first had to do with the way the Board would exercise its remedial authority if such an allegation were established and it appeared to the Board that the appropriate remedy should include the relief, if any, which would have been obtained for the complainant if the union had taken the grievance to arbitration. The Board recognized that it could give the complainant that remedy by adjudicating the merits of the grievance itself and using its authority under section 89 to grant any relief (including reinstatement and compensation) which it concluded would have been granted by an arbitrator or arbitration board. Alternatively, it could direct that the grievance be referred to arbitration, with directions that objection to arbitrability not be raised by the employer on the basis of the union's earlier delay, abandonment or withdrawal of the grievance and, in appropriate circumstances, that the union retain independent counsel to represent the grievor's interests in the union's name at arbitration. In response to procedural uncertainties created by the possibility that the Board would take the first mentioned approach at the conclusion of a hearing, the Board in *Massey Ferguson* announced it would abandon that possibility, so that trade union and employer parties to complaints of this sort could be assured that they need not deal with the merits of the grievance in the hearing of the complaint except to the extent that the merits of the grievance are relevant to the question whether the union has breached section 68. That assurance was the second of the two policies established in the *Massey Ferguson* decision: that evidence going to the merits of the grievance would be considered to determine whether there has been a breach of section 68 but not to determine what remedy would actually have been obtained had the grievance been taken to arbitration.

10. The decision in *Massey Ferguson* suggested that there were no circumstances in which the Board would itself inquire into the merits of a grievance for the purpose of devising a remedy for the union's breach of section 68. The circumstances of this case led me to conclude that, for that purpose, we should inquire into the merits of the grievance or, more precisely, the correctness of the complainant's interpretation of the collective agreement (as opposed to the likelihood of success at arbitration, which involved the additional question whether the employer would advocate any contrary interpretation). The unique features of this case were not present in the *Massey Ferguson* case, nor were they present in any of the cases to which the Board referred in that decision. It may be that future cases will disclose other circumstances in which the referral to arbitration remedy discussed in *Massey Ferguson* would be inappropriate. That is not to say that there has been anything inappropriate about the use of that remedy in past cases, and my decision not to make use of it in the circumstances of this case is not a rejection of its utility in other circumstances.

11. It is apparent that the Board cannot now say that it will never consider the actual merits of the grievance in fashioning a remedy for a breach of section 68 which somehow involves a union's failure to take the grievance to arbitration. That does not mean, however, that union and employer parties to such complaints must now lead evidence which is relevant only to the merits of the grievance, and not to the existence of a breach of section 68, before a breach has been demonstrated. For reasons outlined in *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, the Board's longstanding practice with respect to claims for compensation has been to first determine whether there is liability to pay compensation, leaving the quantum of compensation to be determined only after there has been a finding of liability. For many of the same reasons, it should continue to be the Board's ordinary practice that any question of the appropriate remedial response to the grievance itself will be addressed, whether at arbitration or (where referral to arbitration is inappropriate) by the Board, only if and after there has been a finding that section 68 has been breached. The reasons for bifurcating the issues in that manner remain as cogent, both generally and in circumstances like those presented by the case before us, as they were at the time the *Massey Ferguson* decision was written.

III

12. The relevant provisions of the then current collective agreement, and the complainants' interpretation of those provisions, were set out in paragraphs 7 to 10 of the initial decision. For convenience, those paragraphs are reproduced here:

7. The millwrights and pipefitters in the mechanical department repair and maintain, and occasionally construct additions to, the Mill's equipment and mechanical systems. In the fall of 1982 there were approximately eight journeymen pipefitters and twenty journeymen millwrights in the mechanical department. Some, like the grievors, had been journeymen tradesmen when they began work at the Mill. Others became journeymen after becoming employed at the Mill, either by serving a four-year apprenticeship program under Abitibi's Trades Apprentice Plan, or by establishing proficiency in the trade to the satisfaction of the company's evaluation committee under the Tradesman Promotion Plan after serving a minimum of seven years as a helper in that trade and completing a correspondence course equivalent to that taken by apprentices. Both of these plans have formed part of the collective agreements between Abitibi and the Union for many years. Article 34.03 of the current collective agreement provides:

34.03 When a man transfers from some other job to the status of an apprentice in one of the mechanical trades, he shall maintain his seniority in the job from which he is transferred for a period of six (6) months. Following such probationary period, his seniority shall develop exclusively within the mechanical group to which he transferred. If, when the period of apprenticeship (four (4) years) is served there is a vacancy for a journeyman in the trade for which the apprentice is qualified, he will be retained

and will be granted two (2) years' seniority as a journeyman and will become eligible for promotion in accordance with the Tradesmen Promotion Plan.

The language of Article 34.03 appears again in paragraph 11 of the Trades Apprentice Plan, which is Appendix "I" to the collective agreement.

8. Article 7 of the collective agreement reads:

7. PROMOTIONS AND LAY-OFFS

7.01 When vacancies occur in a department then the Company shall post on bulletin boards throughout the mill a notice concerning the bottom job in the department affected. Such notice shall indicate the qualifications essential to promotion within that department. Such posting shall be for a period of ten (10) working days and the Company shall have the right to make temporary appointment without penalty. **In all cases of promotion the Company will give consideration to seniority, ability and qualifications. When the last two factors are relatively equal, seniority will govern.**

7.02 In cases of promotions, where the man to be promoted is not the senior man in the department concerned, the Company will present the alternative name to the Union, who will have the opportunity to discuss with the Company the qualifications of the senior man. The Company shall take such presentation into consideration in making its decision which decision may be subject to the grievance procedure outlined in Article 30 of this Agreement.

7.03 The Company will train employees to minimize the hiring of skilled men from outside the mill.

7.04 When laying off help Union men shall be retained in preference to those not members, among equally efficient employees, the older in point of service being given preference of employment (the same principles to govern as in the case of promotions).

7.05 In cases of lay-offs, plant wide seniority with due regard to jurisdiction of each of the signatory unions shall apply. In making transfers under this rule it is understood and agreed that in moving between departments, the senior man must have the necessary qualifications to enter the department and shall have access only to the bottom job in the line of progression in the department to which he is being transferred. If the number of senior employees involved in a permanent lay-off exceeds the number of junior employees holding bottom jobs in the lines of progression, the Company, if requested by the Union, will locate other job openings in jobs held by junior employees above the bottom jobs so as to assure continued employment for senior employees. Training will be given if necessary to the senior employees.

7.06 When employees are laid off they shall be recalled in reverse order of their lay-off.

Substantially similar provisions have formed part of Abitibi's collective agreements with the Union and its predecessor, Local 132 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, for nearly thirty years. Some language has remained unchanged despite its becoming outdated. The reference in Article 7.05 to "each of the signatory unions", for example, make less sense now than it did in the 1950's and 1960's, when agreements between Abitibi and this Union's predecessor were also executed by four other (craft) unions. It is common ground that the past practice of the parties to it is an important consideration in the interpretation of this collective agreement.

9. The layoffs which trouble the complainants resulted from production shut-downs of varying durations. Prior to 1982, production shut-downs had generally not resulted in layoffs of journeymen in the mechanical department, as maintenance work ordinarily continued unabated during a production shut-down. The production shut-downs in and after July 1982, were different; they were more frequent, maintenance work was also reduced and journeymen tradesmen were laid

off. When Abitibi followed mill seniority rather than departmental seniority in selecting journeymen for layoff, some tradesmen found themselves without work while men they had originally trained as apprentices or helpers remained at work.

10. Having regard to their understanding of past practice and to the language of Article 7, Article 34.03 and paragraph 11 of the Trades Apprentice Plan, the complainants believe the collective agreement provides that promotion to and layoff from any particular job are both governed by departmental seniority. Article 7.02 governs promotions, and the complainants say that the words "senior man in the department concerned" in that Article refer to the man with the most departmental seniority. The complainants emphasize the words in brackets at the end of Article 7.04, which deals with layoffs. They say those words mean that the seniority which governs the initial selection for layoff is the same seniority which governs promotion: departmental seniority. As a result, they say that selection of persons for layoff from their own departments is to be made on the basis of departmental seniority. They read Article 7.05 as giving effect to mill seniority only in the exercise of bumping rights - the right of an employee targeted for layoff from a job in one department to transfer into a job for which he is qualified in another department, a right the transferring employee can exercise only if he is senior to the employee performing the target job. Thus, in the complainants' view, if a layoff requires a reduction in the number of journeymen millwrights, it would be the millwrights with the least departmental seniority who would lose millwrights' work during the layoff period. Those redundant millwrights could then exercise their mill seniority to bump into any jobs remaining in other departments for which they are qualified.

13. During hearings with respect to liability, complainant John Polhill gave evidence of events in 1969 which led him to believe that seniority as a journeyman in the mechanical department would prevail over mill seniority in the selection of journeymen to be laid off from the mechanical department. His evidence was recited at paragraph 11 of the initial decision:

11. John Polhill says his belief in this interpretation is reinforced by certain events which occurred in 1969. At that time Abitibi planned to lay off a journeymen pipefitter. The choice was between Polhill and Victor Wazinski, who had three weeks' more mill seniority than Polhill. Unlike Polhill, who had been a journeyman when he began working at the mill, Wazinski had begun work at the mill as a second year apprentice and did not qualify as a journeyman until three years after he was hired. At the time of the proposed 1969 layoff, Polhill was told that he would be retained in preference to Wazinski. Polhill recalls that this advice came in the form of a letter from a Mr. Neeley, a company official, who quoted the language of what is now Article 34.03 and explained that Wazinski's departmental seniority was less than that of Polhill because at the end of his first three years of employment he had been credited with only two years' seniority pursuant to that Article. Wazinski received notice of layoff. As it happens, that layoff was cancelled before it occurred. This was the only example any of the witnesses offered of a layoff of journeymen effected or announced prior to July, 1982, in which the choice between mill or departmental seniority as the basis for selection would have affected the identity of the person or persons selected for layoff.

As the initial decision also reflects, the complainants testified that these events had been referred to by Mr. Wazinski and Mr. Nieckarz (who had been President of the Local in 1969) during at least one membership meeting at which the complainants attempted to bring up their grievances (see paragraph 19 of the initial decision). The respondents called Nieckarz as a witness in the April hearings. He testified that in 1969 journeymen in the mechanical department were classified as "A", "B" or "C", that Polhill had been an "A" and Wazinski had been a "C" at the time of the incident referred to by Polhill in his testimony, and that this might explain why Wazinski would have been selected for layoff before Polhill. Cross-examination of Nieckarz established that these alphabetical classifications had to do with the nature of the work which the journeyman was qualified and entitled to perform, and that Nieckarz had no idea whether the "A" classification was a requirement for the work which would have been done after the proposed layoff of 1969. Furthermore, he conceded that this classification distinction had not been in his mind when he spoke out at the membership meeting in 1982. It was apparent from his answers on cross-examination that his

more recent focus on this distinction resulted from a concern which he had since formed about the implications which the collective agreement interpretation advanced by the complainants would have with respect to layoffs in other departments of the mill. I need not assess the effect this concern may have had on his evidence before us with respect to the events of 1969, since that evidence is not inconsistent with the evidence of Polhill that the reason given to him by the company official for its layoff decision had to do with the application of what is now Article 34.03 and not any difference between his classification and that of Wazinski. Although the 1969 proposed layoff is the only evidence of past practice which focuses particularly on the mechanical department, other evidence with respect to past practice is consistent in pointing to departmental seniority as the basis on which workers have been selected for layoff out of their regular job and department.

14. The initial decision recorded the evidence of the then president of Local 132 with respect to past practice in the application of departmental and mill seniority in layoffs:

37. Balina acknowledged it had always been his view that mill seniority governed in the case of layoffs. He said this had been the policy of the Canadian Paperworkers Union for fifty years. It was not clear how he would know that, or where this union policy is to be found. Balina claimed that past practice favoured his interpretation of the collective agreement. In that connection, as we have noted, he had not made any investigation to determine what practice had been followed in the 1969 layoffs referred to in Mr. Polhill's evidence and, we find, by Mr. Wazinski at membership meetings. When the hearing of this complaint adjourned in February, 1984, we invited Mr. Balina to offer some examples of the past practice to which he had referred in evidence. When the hearings resumed four months later, Mr. Balina offered several examples of layoffs in which employees had remained at work as a result of the exercise of mill seniority. However, as he acknowledged in cross-examination, every one of the examples he offered involved a worker first being displaced from his own job on the basis of his *departmental* seniority, then exercising his *mill* seniority to bump into a job in another department. He acknowledged that in each example mill seniority had only come into play after the worker concerned had been displaced from his own department. Still, Mr. Balina insisted that past practice supported the procedure adopted by the company in the series of layoffs which began in July, 1982, when mill seniority, and not seniority within the department, had been the basis for selection of workers to be displaced from their own department. Balina was evasive when asked whether he had taken Article 34.03 and paragraph 11 of the Trade Apprentice Plan into account in forming his own opinion about the meaning of the collective agreement. Balina acknowledged that the seniority referred to in those provisions of the collective agreement must be departmental seniority and not mill seniority. He acknowledged also that departmental seniority had significance in the case of promotions.

Dick Facca, the current President of Local 132, was asked in chief whether he disagreed with the evidence given by Balina. He said that he did not, but added that Balina's evidence did not go far enough. He proceeded to offer a convoluted interpretation of the relevant provisions of the collective agreement and its application to what he described as a "major mill layoff", which he defined as one in which no employees are retained in any department except the mechanical department. Then, he said, the employees with the most mill seniority who have the qualifications necessary to perform the remaining work in the mechanical department must be retained in preference to those with greater departmental seniority. Indeed, he offered the interpretation that an employee could not be selected for layoff on the basis of departmental seniority unless there was a job in another department into which he could bump on the basis of his mill seniority. These interpretations were based solely on his reading the language of the collective agreement and his understanding of union policy. Mr. Facca did not offer any concrete examples of past practice in the application of these provisions and, particularly, no example of an occasion on which the collective agreement had been applied in a manner both consistent with his interpretation and inconsistent with that of the complainants and the employer.

15. Orest Halushak has been the Industrial Relations Superintendent of the Mission Mill

since 1970. Prior to that he was Chief Timekeeper, a position in which he reported to the then Industrial Relations Superintendent. Called as a witness by Abitibi, Halushak could not recall there ever having been a "complete shutdown" of the Mill prior to June 1982, when such a shutdown was first discussed with the trade union. Previous experience with the application of the lay-off provisions in the Mill had been in connection with production cutbacks in which, for example, the mill would switch from a seven-day-per-week continuous operation to a five-day-per-week operation. In those circumstances about forty-five people would ordinarily be laid off. They would be selected for layoff out of their departments on the basis of their departmental seniority. The most junior person would be eliminated. That person would then have the opportunity to bump into a "bottom job" in another department on the basis of his mill seniority if he had the qualifications to perform that job. If the production cutback was indefinite in duration, the layoff would be considered "permanent", and jobs above the "bottom jobs" would also be exposed to bumping on the basis of mill seniority. Based on his experience, Mr. Halushak's understanding was that mill seniority could not be used by an employee to bump back into the department from which the employee had originally been displaced as a result of the layoff.

16. With respect to the shutdown discussed with the union in June 1982, Halushak testified that Balina had had a private discussion with him about that shutdown in early June. Halushak says Balina told him he wanted to ensure that the people with the most mill seniority were retained during the layoff. At that time Halushak understood that this could involve a departure from past practice, but he did not think it would make much practical difference to the company whether it followed past practice or adopted the approach advocated by Balina. The company had had "poor relations" and "a bad year" in its dealings with Local 132. Halushak considered Balina to be the authorized representative of the members of the local, and was disposed to accommodate what he assumed to be their wishes in an effort to improve relations with the union. Without articulating all these reasons for his agreement, Halushak had told Balina that the company would take the requested approach. The company's willingness to do so was later confirmed in a union-management meeting. Halushak's evidence that Balina's request resulted in the application of mill seniority in the first of the several layoffs in question is uncontradicted.

17. The language of Article 7 and its application to a "complete shutdown" in this mill have not been the subject of any previous dispute between the parties to the relevant collective agreement. The same language has been used in collective agreements between Abitibi-Price Inc. and other locals of the Canadian Paperworkers Union with respect to other mills, however. The application of Article 7 to layoffs from the mechanical department in total or complete shutdowns of the Iroquois Falls mill in 1982 was addressed in an arbitration proceeding between Abitibi-Price Inc. and Local 90 of the CPU by an arbitration Board chaired by Professor McLaren. The evidence with respect to past practice and the arguments with respect to the application of the collective agreement recited in the majority award ("the McLaren award") were substantially the same in that case as in this one:

This Collective Agreement is unusual in that it contains no managements' rights clause. It is also unusual in that much of the parties' understanding and practise in dealing with promotions and lay-offs is based upon past practise built up over many years. Frequently, throughout the Collective Agreement one will find only partial reference to the parties' understanding and practise as will become apparent upon reading this award.

The President of the Union, Mr. Beagan, testifies that it has been the practise, aside from the complete shutdowns under consideration herein, that when there was a decrease in production by reducing the scheduled work days, employees would be moved out of departments on the principle of the last man in the department is the first man out of the department. This is described as departmental seniority, but no clause of the Collective Agreement precisely sets out the practise. An employee who has been moved out of the department may then use mill

seniority to bump a junior employee holding bottom jobs in the line of progression within another department. Again, this principle is not precisely found in the Collective Agreement. Article 7.05 is built upon the foregoing principles in that it indicates that there is to be "plant-wide seniority". The Article goes on to state that transfers, which presumes an employee has been bumped out of the department, will have access only to bottom jobs in the line of progression in another department.

In most schedule reductions, the system has worked to give preference to the employees with the greatest plant-wide seniority. It is suggested that it has worked in most scheduled reductions because the Union takes the position that the clauses do not work properly when there is a total shutdown and the Company takes the position that a total shutdown is no different than a reduction in scheduled work days. Testimony reveals that in the past the Collective Agreement has worked because the mill was operating. Article 7.05 contemplates the senior employee moving into another department and having access only to the bottom job in the line of progression in the new department. Article 7.05 then has a super added provision that if that process has not resulted in the most senior employees remaining at work, then "in a permanent lay-off" the Company "will locate other job openings in jobs held by junior employees above the bottom jobs so as to assure continued employment for senior employees".

In a situation where the mill is shutdown, Article 7.05 can operate, but it is to no effect because there are neither bottom jobs or "junior employees above bottom jobs" for which the more senior employees might be able to bump. The problem arises in this case because during the shutdown some of the tradesmen in the mechanical department continued to work. The effect of distinguishing between departmental and mill seniority for these employees was that people with more departmental seniority were able to remain in the mechanical department working while those with less departmental seniority but more plant seniority were bumped out of the department based on the last in first out principle. Once they had been bumped out of the department, there would be no other jobs than a handful of new security jobs to cover increased patrols during the shutdown. There were no positions into which these mechanical crew employees might bump. In the words of Mr. Beagan, they were "sitting on the bench while more junior employees in total mill seniority were working". This is the cause of the Grievance and is a situation which has not arisen before because there has never been a mill shutdown.

What is at issue in this arbitration is whether the past practise ought to be applied on the theory that a total shutdown is merely a variation of a reduction in the work schedule, as the Company argues, or, whether a new understanding ought to arise. It appears from an examination of Article 7 and other provisions of the Collective Agreement, that the parties have added clauses to this Agreement as necessary to deal with specific situations as they have arisen over the years. The principle lying behind Article 7.05 is to "assure continued employment for senior employees". The Union argues that if that is the principle, then under the circumstances of a plant shutdown, the most senior employees can use their mill seniority within the department to bump the more senior employees in terms of departmental service, but more junior in terms of plant-wide seniority.

18. The McLaren award held that the union's position could only prevail if support for it could be found in the language of the collective agreement. It concluded that there was no such support:

The Union cannot ask a Board of Arbitration to create a new provision in a Collective Agreement. Such a provision must be determined through the negotiating and bargaining process. Both parties are, therefore, forced to turn to the Collective Agreement to find support for their position while recognizing that there is a certain degree of artificiality to that process because the Collective Agreement has not been constructed to take account of the situation. It is the Board's view that the parties must ultimately bargain the resolution of the problem.

What remains for this Board to do is examine the language of Article 7 to determine if the principle of assuming continued employment for the most senior employees can be found to permit the mechanical crews to assert mill seniority over departmental seniority. While this Board recognizes the importance of the seniority principle and the need to protect it; the Board can only do so based upon the language in the Collective Agreement.

The first answer to the Union Grievance is that a total plant shutdown is no different than a reduction in scheduled work days. The reduction which occurs is from operating a given number of days to not operating at all. It is merely a more drastic form of reduction in work days. There is, therefore, no reason based on that fact to operate the seniority provisions and the bumping rights in any fashion which is different from how it has been done in the past when the reduction in scheduled work days has only been of a less drastic nature.

The language in the Collective Agreement supports the process of promotion within a department on the basis of departmental seniority in Clause 7.02. The process of laying off employees is to be on the basis of the last in first out principle in each department as is suggested by the parenthetical phrase at the close of Article 7.04. Then the practise of the most junior employee, having been bumped out of the department using his plant-wide seniority to find bottom jobs in the line of progression of another department, is set out in 7.05. The desire of the Union to go through that practise and then if that has not resulted in the most senior employee remaining at work to permit the employee to return to his department and exercise mill seniority against employees in his own department who have greater departmental seniority can only be asserted through the reference to plant-wide seniority in the opening sentence of Clause 7.05. That language cannot be read in isolation from all of the other provisions of the Collective Agreement and is a statement which is made in connection with the bumping rights associated with an employee who has been bumped out of his department and is now looking for work elsewhere in the mill. There is, therefore, no language to support the Union proposition as argued before the Board. Nevertheless, the Board finds it an anomalous result when the clear intention of the parties in drafting all of Article 7 was, as is indicated in 7.05, "to assure continued employment for senior employees". The Board is, however, without jurisdiction to implement that principle without more language which would provide the bedrock from which to assert that the members of the mechanical department might use their mill seniority against those employees with greater departmental seniority. For the foregoing reasons, this aspect of the Union's Policy Grievance must be dismissed and it is so ordered by this Board.

19. The parties before us all recognized that we would not be bound by the McLaren award in coming to our conclusions with respect to the issues before us. The complainants and the employer both argued that we should accept the award as persuasive and adopt the analysis in it. The respondents argued that the McLaren award was distinguishable because there is no reference in it to Article 34.03 and because, in counsel's submission, the majority must have made some other findings of fact which are not reflected in the McLaren award itself. I do not see in the award any suggestion that there are facts the majority found critical to the result which were not recited by them in the portions of the award I have quoted here. It is true that the award makes no reference to Article 34.03 nor, indeed, to any other article of the collective agreement between those parties, in dealing with the meaning of Article 7. I am unable to see how that usefully distinguishes the case from the one before us, however, since reference to that article would only add weight to the argument that departmental seniority has some part to play in the interpretation and application of the collective agreement and, particularly, that departmental seniority has some role to play in determining eligibility for promotion and, therefore, layoff, at least within the mechanical department.

20. The word "seniority" appears in various contexts in the collective agreement between Abitibi-Price Inc. and the respondents. The phrase "plant-wide seniority" appears only in Article 7.05. Article 7.01 refers to "seniority", Article 7.02 refers to "the senior man in the department concerned" and Article 7.04 refers to "the older [employee] in the point of service." Article 34.03 speaks of "seniority" as developing exclusively within the mechanical group and to "seniority as journeyman" in the context of eligibility for promotion. If the ambiguity in the meaning or meanings of the word "seniority" in these various provisions is not clear on the face of the collective agreement, it certainly becomes clear from the evidence of the parties' past practice. The evidence discloses that, as of June 1982, the past practice of the parties to the collective agreement applicable to the Mission Mill when applying its provisions with respect to layoffs was the same in all material respects as the past practice dealt with in the McLaren award. I am satisfied that the

McLaren award came to the correct conclusion about the meaning and proper application of the language of Article 7 in the case of a "total shutdown" or "major mill layoff." The collective agreement with which we are concerned does not make special provision for those circumstances. Article 7.05 enlarges bumping rights in the case of a "permanent" layoff, but the relevant collective agreement provisions do not otherwise provide different rules for different sorts of layoffs. With respect to the layoffs in question here, I conclude that the provisions of the relevant collective agreement applied in a manner consistent with past practice required that journeymen in the mechanical department be selected for layoff on the basis of their seniority as journeymen within the mechanical department and not on the basis of their mill seniority.

IV

21. Material filed with us by the parties indicates that there were five layoffs between July 1982 and September 1983 during which one or more of the complainants was not scheduled for work but would have been scheduled for work if selection for layoff out of the mechanical department had been based on seniority as a journeyman within the mechanical department rather than on mill seniority. Those layoffs occurred in the weeks of July 25, 1982 and March 20, April 17, July 24 and September 18, 1983.

22. Having regard to the observations in paragraphs 80 and 82 of the initial decision, evidence led during the April hearings in this matter addressed the question whether the company's application of mill seniority in selecting journeymen for layoff during the week of July 25, 1982 was the result of a request from Mr. Balina or anyone else on behalf of the respondents. That evidence clearly established that it was, in fact, the sole result of a request made by Balina in his capacity as president of the local union. Lecuyer and Podlewski did not work during that week, but would have worked had layoffs from the mechanical department been made on the basis of seniority as a journeyman in that department. Acceptance at arbitration of the complainants' interpretation of the collective agreement would not have resulted in recovery of their lost wages, however, since Abitibi could have argued successfully that the union was estopped from seeking to enforce that interpretation in respect of that particular layoff because in effecting that layoff it had acted on Balina's June 1982 request, made with ostensible authority on the union's behalf, that upcoming layoffs be so conducted as to ensure that employees with the most mill seniority remained employed.

23. The complainants' argument with respect to their losses arising out of the July 1982 layoffs proceeded on the assumption, which was not questioned by the union or the Board at the time, that the respondents would be liable to compensate them for those losses if the Board found Abitibi not liable because of a successful estoppel argument. On reflection, that does not seem correct.

24. The earliest union behaviour with which the complainants took issue in this complaint was the union's failure to process grievances arising out of the July 1982 layoffs. Based on the facts as I now have found them, I conclude that those grievances would *not* have been successful if the respondents had processed them through to and including arbitration in a single-minded fashion, with all the resources at their command. That is because the employer could successfully have relied in its defence on Balina's June 1982 request that upcoming layoffs be so conducted as to ensure that the employees with the most mill seniority remained employed. None of the complainants would have recovered compensation. Their failure to do so would not have been the result of the behaviour about which they took issue in this complaint but, rather, the result of Balina's request to Halushak in June of 1982. It has not been alleged that, and the Board has not considered whether, the making of that request constituted a violation of section 68 of the *Labour Rela-*

tions Act. The behaviour with which this complaint has dealt is behaviour which occurred after the complainants first began filing grievances. The premise on which our remedial response is based is that honest consideration of those grievances would have led the union to conclude that the complainants' interpretation of the collective agreement was the correct one and, having regard to the union's internal rule about changes to the collective agreement, that that interpretation would have been advocated unless and until an appropriate resolution had been passed to support a changed approach or interpretation. Had the union asserted the correctness of the complainants' interpretation after July 1982, Abitibi might well have conformed to that interpretation in subsequent layoffs and, in any event, could not thereafter have relied on estoppel in a grievance over any subsequent layoff effected on the basis of mill seniority alone. As all of the behaviour found to violate section 68 occurred before the four other layoffs in respect of which damages are claimed, there is clearly a direct link between the complainants' losses, if any, in those layoffs and the breach which was the subject matter of the initial decision. The same cannot be said about the losses claimed with respect to the July 1982 layoffs. In the absence of a claim and a finding that Balina's June 1982 request to Halushak constituted a violation of section 68, we cannot see how the union could properly be held liable to Lecuyer or Podlewski for the wages they would have earned in the week of July 25, 1982, had layoffs that week been conducted in accordance with past practice. As the difficulty I have identified was not addressed in argument, I will consider any written representations thereon which the parties may wish to submit, on a timetable similar to that set out in paragraph 84 of the initial decision.

25. Documentation filed by agreement of the parties indicates that complainant Lecuyer would have worked five days in each of the weeks of March 20, July 31 and September 18, 1983 had millwrights been selected for layoff on the basis of their seniority as journeymen in the mechanical department rather than mill seniority, and would have earned \$589.60 in the week of March 20, 1983 and \$648.40 in each of the weeks of July 31 and September 18, 1983.

26. Polhill would have been scheduled to work five days in each of the weeks of March 20 and April 17, 1983 and two days in the week of September 18, 1983 had the company selected pipefitters for layoff on the basis of their seniority as journeymen in the mechanical department rather than mill seniority. With respect to the weeks of March 20 and April 17, 1983, in each case Polhill elected after the week was over to have it treated as a week of paid vacation. He did this afterwards, rather than beforehand, so that he would be treated as available for work during those periods if the opportunity of additional work arose. Had he booked those weeks as vacation in advance (as he did with respect to some other layoff periods) he would not have been considered for additional work opportunities. As it happens, additional work opportunities did not arise during those two weeks. Having retroactively designated them as vacation weeks, Polhill received vacation pay for those pay periods in an amount equivalent to the wages he would have earned had he been properly scheduled to work in those weeks.

27. The union argues that Polhill has suffered no financial loss for which it should be liable in respect of those two weeks. The collective agreement provides that the taking of vacations is compulsory; they cannot be accumulated, but must be taken in the year when they are due. Had Polhill not designated these two weeks as vacation weeks, he would have been required to take a vacation in two other weeks during which he did work. In the result, the number of weeks in which he could earn wages was not adversely affected by the company's failure to schedule him for work in those two particular weeks. Indeed, Polhill conceded in cross-examination that he had not suffered a loss of earnings. As he put it, he suffered a loss of holidays. One presumes he meant that he had lost some flexibility in the scheduling of his holidays, as well as some of the enjoyment he would have derived from those days away from work had he regarded them in advance as vacation days rather than as days on which he would hold himself ready to respond to any call-in. While

Polhill testified in chief that he would not have designated those weeks as vacation weeks had he not been scheduled to work, the use which he would otherwise have made of those two weeks of vacation was not addressed in his evidence. Accordingly, there is very little to on in assigning any monetary value to the loss of flexibility in vacation scheduling. Certainly, I do not accept that two full weeks' wages is the measure of that loss. In the end, I do not propose to assign any monetary value to that loss for this reason: the initial decision of July 23, 1985, directed that the complainants prepare and deliver full particulars of their claim for financial loss by a specified date. Particulars were delivered under cover of a letter dated August 28, 1985. Those particulars did not include a claim on Mr. Polhill's behalf with respect to either of these two weeks. The intention to assert such a claim apparently arose sometime thereafter, and notice that such a claim would be made was only given the day before the April 1986 hearings began. In these circumstances, I do not propose to make any monetary award with respect to this untimely and intangible claim.

28. In his evidence, Mr. Facca stated that there were employees with less mill seniority than Lecuyer and Polhill at work in departments other than the mechanical department during the weeks of March 20 and September 1, 1983. He suggested that those complainants could have mitigated their losses with respect to those weeks had they elected to exercise mill seniority to bump into the jobs performed during those weeks by those other employees. Polhill denies that such opportunities were available either to him or Mr. Lecuyer, stating that the jobs available were not "bottom jobs" within the meaning of Article 7.05. It is aparent that the layoffs on those occasions were not "permanent layoffs" within the meaning of article 7.05, and the respondents have not established that the work being performed by the persons whom the union claims could have been bumped by the complainants was "bottom job" work of a sort which gave rise to such bumping rights in the circumstances. The onus of proof with respect to an alleged failure to mitigate rests on the party who asserts that there has been such a failure. The respondents have not discharged that onus with respect to the remaining claim for Lecuyer with respect to the week of March 20, 1983 and the claims of Lecuyer and Polhill with respect to the week of September 18, 1983.

29. In the result, I find the respondents liable to pay compensation to Polhill for lost wages in the amount of \$259.36 with respect to the week of September 18, 1983 and to pay compensation to Lecuyer for lost wages in the amount of \$1,886.40, representing \$589.60 for the week of March 20, 1983 and \$648.40 each for the weeks of July 31 and September 18, 1983.

30. The complainants ask that they be awarded interest on lost wages for which they are found entitled to compensation. This is a proper component of compensation, for reasons given by the Board in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. Beyond reference to that Board decision, no argument was addressed to the method of calculating interest on the amounts awarded. The method described in *Hallowell House Limited*, *supra*, was designed specifically to enable the calculation of interest on awards of compensation for a continuing loss of earnings over an extended period which ends with the order awarding such compensation and costs. The methodology adopted was a "rough and ready" one meant to approximate calculation of interest on each week's loss from that week to the time the determination is made, so as to avoid the extreme detail which the latter form of calculation would otherwise require. Here we are dealing with a very small number of very discrete losses which occurred on the days some years ago when paycheques would otherwise have been received for the periods in question. Attempting to adapt the *Hallowell* methodology to this type of loss would be more complex than simply taking the more exact approach the *Hallowell* methodology was intended to approximate. By analogy with rules applicable to court proceedings in Ontario, interest should run from the day the loss is suffered or the day written notice of the substantive claim was given to the respondent, whichever is later, calculated at a prevailing interest rate determined with reference to the date proceedings commenced. *Hallowell House* adopted the "prime rate" as determined by the Bank of Canada for the month preceding

month in which the complainant was filed as the relevant interest rate. On that approach, the appropriate interest rate in this case is 11% per annum. The complainants gave notice of their substantive claim on March 14, 1983 (see paragraph 24 of the initial decision), which predates the losses for which compensation is granted here. Accordingly, the respondents shall pay interest on each week's loss, calculated from the pay day on which the lost wages would have been paid to the date of this decision. Taking that approach, it is unnecessary to divide any sum by two (see Practice Note 13, particularly paragraph 4.) In order to make a precise calculation of interest, we would need to know what was the pay day for the weeks of March 20, July 31 and September 18, 1983. I assume the parties can agree on those dates and make the necessary calculations; the Board retains jurisdiction to determine the precise amounts of interest hereby awarded if the parties cannot.

31. The final matter with which we must deal is the complainants' claim that an award of compensation should include reimbursement of their legal and other expenses preferable to participation in the Board's hearings of April 3 and 4, 1986. This claim was first made in the complainants' counsel's August 13, 1985 response to the request for submissions contained in the initial decision. Counsel for the complainants wrote:

In the event the Board does decide to make a determination of the meaning of the Collective Agreement, the Complainants submit that it would be consistent with previous Board decisions that the Board order that the Complainants are free to be represented at such a continuation hearing by counsel of their choice and that the Respondents, Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, be responsible for all legal costs thereby incurred by the Complainants including legal fees, subpoena costs, wages lost by the Complainants in attending hearings and any other expenses which reasonably flow in the same manner as if the grievances were being arbitrated.

The superficial attractiveness of this argument stems, in part, from its characterization of what the Board was then considering doing, and subsequently decided to do, as merely taking over a function which might otherwise have been performed by a board of arbitration in circumstances otherwise completely analogous to those in which the Board would ordinarily direct that a union found in breach of section 68 process of the complainants' grievance to arbitration and retained a counsel satisfactory to the complainant to present that grievance at arbitration at the union's expense. That characterization minimizes the very substantial differences between this case and those in which such remedial orders are granted. The Board has not here chosen to act as a mere substitute for a board of arbitration. What we have done is engage in a further hearing with respect to matters of remedy, during which it was necessary for us to interpret the collective agreement in order to determine whether the complainants' interpretation was correct and hence, in accordance with the union's own rules, entitled to the union's support unless and until a change to the collective agreement was authorized by the membership and agreed to by the employer. That was not a question which it had been necessary to determine in order to assess whether section 68 had been breached. It was not a question which, in the circumstances of this case, could fairly have been assessed in an arbitration proceeding in which the union might not have been entitled to assert any interpretation inconsistent with that advanced by the complainants. In other words, with respect at least to layoffs subsequent to July 1982, there was something more to be determined by the Board before it could be said that the matter ought to have gone to arbitration. It seemed likely after our first hearings, and is apparent now, that there would have been little or nothing to an arbitration in which the interests advanced were those of the complainants and the employer, since the complainant and employer appeared to agree on the interpretation of the collective agreement and could have settled all but the company's estoppel defence with respect to the July 1982 layoffs on the basis of that interpretation. Only a very small portion of what we heard April 3rd and 4th would have been heard by an arbitration board in these circumstances, so there can be very little analogy between the complainants' expenses of these hearings and the expenses which might have been

borne by the union had there been a referral to arbitration. In short, the analogy with what would have taken place had the case warranted the kind of remedial order made in the other cases cited by the complainants is simply unhelpful, because this was not that sort of case.

32. The other element which makes the complainants' submissions superficially attractive is the same feature which makes all claims for costs superficially attractive: the fact that the complainants have undoubtedly incurred substantial legal and other expenses in proceedings in which they have succeeded. That characteristic is shared by all of the cases in which the Board has been asked to award the successful party "costs" of the proceedings before it. Apart from the question of the Board's jurisdiction to award costs, the arguments in favour of awarding costs to a successful applicant or complainant would have equal force if made by a successful respondent in support of a claim that its costs of proceedings resulting in the dismissal of a complaint against it be paid by the unsuccessful complainant. This Board has repeatedly said that if it does have the power to award costs to a successful complainant, it would be inappropriate to exercise that power when there is no corresponding power to award costs against an unsuccessful complainant: see, for example, *Silknit Limited*, [1983] OLRB Rep. Nov. 1913 at paragraph 8. The nature of the proceedings before us in April, however novel those proceedings may seem, does not warrant a departure from the Board's policy with respect to costs, and I award none here.

33. One matter left outstanding by both the initial decision and the decision of August 29, 1985 is the form of the Notice to Employees contemplated by paragraph 85 of the initial decision. I direct that the respondents forthwith post copies of the attached notice marked "Appendix", duly signed by representatives of the respondents, on each and every of the bulletin boards and other locations in Abitibi's Mission Mill which are ordinarily available to it for the posting of notices of union business. The respondents shall keep the notices posted for 60 consecutive working days, and shall take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. If the respondents' use of bulletin boards and other locations is subject to a requirement that Abitibi approve the material the respondents propose to post, then Abitibi is hereby ordered to forthwith give the required consent or approval to the posting provided for in this paragraph.

DECISION OF BOARD MEMBER L. C. COLLINS;

I disagreed with my colleagues' original finding that the respondents violated section 68. Had my view of the matter prevailed, there would be no question of remedy. Nevertheless, taking my colleagues' decision of July 23, 1985 as a necessary starting point, I must say I agree with Vice-Chairman Gray's reasons for the decision of August 29, 1985, with which I concurred. I also agree with his interpretation of the collective agreement and with the way he dealt with the parties' arguments on damages, interest and costs.

DECISION OF BOARD MEMBER J. A. RONSON;

Respectfully, I must dissent with the reasoning of my colleagues.

2179-86-U Raymond McLeod, Complainant v. Camco Inc. and United Electrical, Radio and Machine Workers of Canada (UE) Local 550, Respondents

Duty of Fair Representation - Unfair Labour Practice - Allegation that union did not investigate complainant's discharge grievance - Board discussing extent of union's responsibility to investigate grievances - Investigation found to be inadequate considering serious nature of grievance - Grievor's lack of effort in aiding the investigation not ameliorating approach of union - Grievance ordered to arbitration

BEFORE: *Judith McCormack*, Vice-Chair.

APPEARANCES: *Raymond McLeod* on his own behalf; *R. Chris Wartman* and *L. Piecyk* for Camco Inc.; *Frank Piserchia* and *Ralph Currie* for the United Electrical, Radio and Machine Workers of Canada (UE) Local 550.

DECISION OF THE BOARD; April 10, 1987

1. The names of the respondents are amended to read: "Camco Inc." and "United Electrical, Radio and Machine Workers of Canada (UE) Local 550".
2. This is a complaint filed under section 89 of the *Labour Relations Act* in which the complainant alleges that the union has breached section 68 of the Act by failing to properly pursue his grievance and refusing to refer it to arbitration.
3. Raymond McLeod has worked as an assembler for the past 11 years for Camco Inc., an appliance manufacturer. There is no dispute that he was a member of a bargaining unit represented by the respondent at the time of the events in question. He testified on his own behalf in this matter.
4. Mr. McLeod told the Board that in May of 1986, he was working on the evening shift and found that he needed a part in another aisle. This meant walking past a pile of stove ranges awaiting assembly. As he walked by, a stove range was pushed out so that it landed in front of him. Mr. McLeod testified that he picked up the range and deposited it in a pile for scrap ranges.
5. He then went over to where employee John Dennis was standing to ask him what had happened. It appears that the relationship between Mr. Dennis and Mr. McLeod was not amicable at the best of times. Mr. McLeod told the Board in the course of the discussion, Mr. Dennis pushed him on the shoulder. Mr. McLeod looked around, intending to push Mr. Dennis back until he saw the foreman, Doug Allen, nearby. Mr. Allen came over and attempted to ascertain the cause of the altercation. Mr. McLeod explained his side of the story and Mr. Allen suggested that he leave the area briefly while Mr. Allen spoke to Mr. Dennis.
6. Mr. McLeod returned to his work station after 15 minutes and found that Mr. Dennis was still very angry about the incident. Periodically throughout the rest of the shift, Mr. Dennis yelled threats at Mr. McLeod, including "you're dead outside", "I'm going to kill you", and "you're dead meat".
7. Two knives are kept for cutting rubber sleeves at Mr. Dennis' work station. Shortly before the end of his shift, Mr. McLeod glanced over and noticed that the knives were gone. He then became very worried that Mr. Dennis was going to attack him outside the plant. As a result, he took a piece of scrap steel bar and hid it up his sleeve.

8. At 12 o'clock midnight, employees converged on the punch clocks prior to leaving work. Mr. Dennis was lined up in front of Mr. McLeod with some 12 people in line between them. Mr. Dennis punched his card and left. Mr. McLeod subsequently punched out and prepared to walk through the door into a breezeway between the plant buildings. As he walked through the door, he told the Board that he saw a shadow moving towards him quickly, which turned out to be Mr. Dennis. He also saw a coat hanging up on a protrusion and a lunch pail on the ground.
9. As Mr. Dennis approached Mr. McLeod, the latter took out his bar and yelled 'stay away from me, man', at the same time moving the bar up and down in front of his body to create a barrier. According to Mr. McLeod, Mr. Dennis ducked, came up under Mr. McLeod's arm and grabbed the latter's shirt front. Mr. McLeod was afraid that Mr. Dennis had a knife and he hit Mr. Dennis with the steel bar. During this time, Mr. McLeod had started moving backwards with Mr. Dennis still hanging on to his shirt. Mr. McLeod hit him on the arm and broke loose from his grasp. Other employees then restrained the two men and Mr. McLeod left the scene. The employer called no evidence on these events and it is not my task to determine what actually occurred that night. These facts have been set out to provide a context for the subsequent sequence of events.
10. The following day Mr. McLeod reported for work early, assuming that someone from the company would want to ask him about the fight. He was met at the plant gate by a security officer who escorted him into a room where he was left for an hour and three quarters. Eventually Mr. Piecyk, the manager of shop operations range, and an unidentified man interviewed Mr. McLeod and then wrote out a statement for him to sign. The two men left and returned shortly thereafter at which time Mr. Piecyk asked Mr. McLeod whether he wanted to quit or be fired. Mr. McLeod indicated that it was up to Mr. Piecyk, who then terminated his employment. At that point Mr. Piecyk asked Mr. McLeod if he wished to speak to a union steward. Mr. McLeod refused this offer as he felt it would not be useful since he had already been terminated. According to Mr. McLeod, Mr. Dennis was not disciplined. His evidence in this regard was uncontradicted.
11. Two days later, on May 6, 1986, Mr. McLeod spoke to Larry Millen, President of Local 550 of the respondent union who filed a grievance on his behalf. It appears that a grievance meeting was held with the company on May 12, 1986 and that the grievance was denied in writing by the company on May 15, 1986.
12. Ralph Currie, National Co-ordinator for the Hamilton area for the respondent union, told the Board that a meeting of the union's Grievance Panel was held on May 26, 1986. This Panel consists of the chief stewards, two directly elected members, the local president and Mr. Currie. Its purpose is to review grievances and make recommendations to the Stewards' Council. According to Mr. Currie, on this occasion the Panel discussed Mr. McLeod's grievance and decided that it should be tabled (that is, not referred to arbitration) because the information they had in their possession pointed to the likelihood of the grievance being dismissed at arbitration.
13. Mr. Currie testified that the information the union acted upon was supplied by three witnesses who had come to the union and volunteered that Mr. McLeod had attacked Mr. Dennis from behind. To his knowledge, no one from the union had spoken to employees in the area of Mr. McLeod's work station. Mr. McLeod had been disciplined some years previously and it was on the basis of this information, together with his previous disciplinary record, that the Panel decided to table the grievance.
14. Later that evening, Mr. McLeod appeared and asked to attend the Stewards' Council meeting, which followed the Grievance Panel meeting. Mr. Currie told him that he could not attend the Stewards' Council meeting, but that the Grievance Panel had recommended that his

grievance be tabled and that he would receive a letter to this effect. Mr. Currie also advised him that he could appeal this decision to a membership meeting. That night, the Stewards' Council accepted the Grievance Panel's recommendation to table the grievance.

15. Mr. McLeod subsequently attended a members' meeting on May 28, 1986. He presented his description of events and was asked whether he had any witnesses to support his case. At that time, Mr. McLeod told the union to speak to a fellow worker whom he identified only by his first name and his work station. At the meeting it was decided to extend the time for considering the grievance until the June membership meeting for the purpose of allowing Mr. McLeod to produce witnesses to support his case. If such witnesses were not produced, the grievance would be tabled.

16. Some time during this period, Mr. McLeod attempted to set up a meeting between Mr. Currie, and Jeffrey Williams, the employee to whom Mr. McLeod had referred at the membership meeting. Unfortunately, Mr. Williams failed to attend the meeting. Mr. Williams told Mr. McLeod that he was scared that he was going to get in trouble with his fellow employees.

17. At the membership meeting in June, employee Rudy Oliveros suggested the name of another employee who might be able to help Mr. McLeod. It was then decided to give Mr. McLeod another extension on essentially the same terms.

18. During the same period Mr. McLeod met Winston Barnes, another employee, on the street in Hamilton and found that Mr. Barnes had overheard the incident with Mr. Dennis inside the plant. As a result, Mr. McLeod phoned Tony McNulty, Mr. Currie's vacation replacement, and told him Mr. Barnes' full name and again provided Mr. Williams' first name. Mr. McLeod was not sure whether this call was placed in August or in October of 1986.

19. The next membership meeting was held in August of 1986. Mr. McLeod did not attend because he felt by this time that the union did not care about his grievance and that Mr. Currie was treating him as if Mr. McLeod was bothering him. He felt that he was getting the brush off. At the August meeting, it was decided that Mr. McLeod's grievance would be tabled as he had not yet brought forward any witnesses to testify on his behalf at an arbitration.

20. Mr. McLeod also faced criminal charges arising out of the fight. Mr. Williams, who had promised to testify in court on behalf of Mr. McLeod, failed to appear, and Mr. McLeod was convicted of assault and placed on probation.

21. Both Mr. Barnes and Mr. Williams were subpoenaed to appear before the Board and both testified.

22. Mr. Barnes has also worked at Camco Inc. for 11 years as an assembler. He was working near the work area where the range incident occurred, and essentially corroborates Mr. McLeod's story with respect to both the altercation on the shop floor between Mr. Dennis and Mr. McLeod and Mr. Dennis' subsequent threats.

23. He also told the Board that at breaktime, because of the threats Mr. Dennis had been making, he asked Mr. McLeod whether he was going to get into a fight with Mr. Dennis. Mr. McLeod answered that he would try and walk away, but that if he had to fight, he would not back down.

24. Mr. Barnes advised the Board that when Mr. Allen intervened in the argument between Mr. McLeod and Mr. Dennis, Mr. Allen had told them that if they wanted to fight, they should

not do it on company time or on company premises. He also testified that nobody from either the union or management had come down the assembly line to ask employees if they had seen anything of the incident.

25. Mr. Williams has worked at Camco Inc. for three and a half years as an assembler. His version of the fight outside the plant tallies with Mr. McLeod's in all material respects. The following day, Mr. Williams was asked if he had seen anything by Alex Weir, a shop operations manager. Mr. Williams gave a written statement to Mr. Weir which, he testified, paralleled his evidence before the Board. It appears that the company did not tell either the union or Mr. McLeod that they had such a statement in their possession.

26. Mr. Williams told the Board that he did not go to court with Mr. McLeod because he did not want to get involved. He said he did not want to be "in the middle of it" at work, and implied that supporting Mr. McLeod was not a popular position with his fellow employees. He felt that since he had given his statement to someone whom he perceived as official, that is, Mr. Weir, he had done his duty.

27. The essence of Mr. McLeod's complaint is that the union did not provide him with the assistance to which he felt he was entitled. In his view, if the union had investigated his grievance more thoroughly, they would have uncovered the evidence of Mr. Barnes and Mr. Williams. As it was, he argued that the union had not done enough to find out about his side of the case.

28. Mr. Piserchia argued on behalf of the union that there was no evidence of discrimination against or malice towards Mr. McLeod. He conceded that the union had a duty to investigate grievances, but pointed out that Mr. McLeod had not done much to assist in the investigation. In his submission, the union made the decision to table Mr. McLeod's grievance in good faith on the evidence that was available to it at the time, and the fact that other evidence emerged at a later point should not cloud the Board's perception of the union's conduct. Finally, he argued that Mr. Currie was bound by the decision of the membership meeting.

29. Section 68 provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

30. The Board elaborated on its approach to section 68 in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

31. It is well established that section 68 does not require a union to forward a grievance to

arbitration solely because an employee desires to have his or her "day in court". As the Board commented in *Catherine Syme*, [1983] OLRB Rep. May 775:

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

32. The central issue which crystallized in this case is the extent of the union's responsibility under section 68 to investigate Mr. McLeod's grievance. That section 68 imposes such a responsibility is well established in the Board's jurisprudence (see, for example, *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Jeanne St. Pierre*, [1986] OLRB Rep. June 883, and *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215). To avoid the characterization of a decision as arbitrary, a union must, among other things, turn its mind to all the relevant facts in a case. It follows that the union must therefore make reasonable efforts to unearth the relevant facts so that they may be considered. Thus a union is required to enter into a process of collecting and evaluating information as a preliminary step to making a decision which is consistent with the duty of fair representation. As the Board noted in *Savage Shoes Ltd.*, *supra*:

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

33. This is not to suggest that every grievance must give rise to a formal or protracted investigation. The Board is sensitive both to the fluidity and informality which characterizes many aspects of labour relations, and the fact that individuals with varying degrees of experience and expertise may be involved in such a process (see *Ford Motor Company of Canada*, [1973] OLRB Rep. Oct. 519). However, the process of gathering the relevant information must, at the very least, be undertaken fairly and in a manner which cannot be described as perfunctory.

34. In the instant case, it was clear from the evidence that Mr. Currie was not involved in the initial investigation of the grievance and that he, like the other members of the Grievance Panel, was acting on information obtained by Larry Millen, the President of Local 550. Mr. Millen testified that in the course of the ongoing investigation of Mr. McLeod's grievance which continued until August, he had interviewed some 35 or 40 employees to ascertain what had occurred. He told the Board that the information he obtained through this process was not consistent with Mr. McLeod's story.

35. I did not find Mr. Millen to be a reliable witness. Although he claimed to have spoken to 35 or 40 employees, he could remember the names of only two; one who had volunteered information supporting Mr. Dennis' position the day following the fight, and another who was the employee referred to by Mr. Oliveros in the June membership meeting. Moreover, his evidence was inconsistent with Mr. Currie's testimony in which he told the Board that the Grievance Panel had made their decision on the basis of information from three witnesses.

36. I note that the employer came across Mr. Williams in the course of its own investigation very shortly after the incident, and that Mr. McLeod had given the union Mr. Williams' first name and work station on May 28, 1986. I find it difficult to understand how both Mr. Barnes and Mr. Williams could have eluded the union if the investigation had been as comprehensive as Mr. Millen describes. (I make no comment on the wisdom of the employer withholding Mr. Williams' statement from both the union and Mr. McLeod.)

37. Having had the opportunity to assess the credibility and demeanour of both Mr. Currie and Mr. Millen, I find the former's testimony more reliable and consistent with the other evidence in this matter. I therefore find that at the time the Grievance Panel made its decision to recommend tabling the grievance, it was relying on information supplied by three employees on their own initiative which supported Mr. Dennis' version of events. Subsequent to that decision, I find that Mr. Millen also spoke to one other employee whose name had been raised in the June membership meeting.

38. In the circumstances of this case, I find it difficult to avoid the conclusion that the investigation conducted was inadequate, particularly in view of the serious nature of the grievance. The Board has commented previously on the importance of discharge grievances in the context of section 68 in *Swing Stage Ltd.*, *supra*:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their termination reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge. That is not to say, however, that the duty of fair representation contemplated under section 68 of the Act is unable to remain responsive to labour relations realities.

39. In this case, I find it troubling that the union relied solely upon information volunteered by employees in circumstances where feelings were running so high in the plant. (The fourth employee to whom the union was referred by Mr. Oliveros was apparently unable to provide information one way or the other.) While information provided by three employees might well be sufficient or more than sufficient in other circumstances, here Mr. Millen knew or ought have known that he was hearing a one-sided version of events.

40. In this context, the union's failure to pursue the information provided by Mr. McLeod with respect to Mr. Williams is particularly serious. While it was not clear from the evidence when Mr. Barnes' name was provided to the union, information with respect to Mr. Williams was raised by Mr. McLeod at the members' meeting of May 28, 1986, some three months before the final decision to table the grievance.

41. Moreover, it does not appear that the union ever put the information gathered against Mr. McLeod to him to enable him to respond to it. While he was told generally that his version of events was not supported by other witnesses, there was no evidence that he was given any real opportunity to deal with the allegations against him in a meaningful way.

42. It is worth emphasizing at this point the obvious proposition that each case turns on its own facts and that similar facts in a different context may have different implications. However, in the somewhat charged climate in which these events took place, the union's investigation was inadequate and fell short of the standard required under section 68.

43. The argument that Mr. McLeod himself could have done more on his own behalf in looking for witnesses is not without some merit. However, the union's duty of fair representation in these circumstances is not dependent upon the degree to which an employee can provide assistance in his own cause. The proscription against arbitrary conduct in section 68 is predicated on the fact that the union has been accorded exclusive rights to represent employees in their labour relations. The exclusivity of the union's mandate carries with it certain responsibilities with respect to the exercise of that representation which are appropriately attendant on a role of such significance. It follows that the core of the duty of fair representation obtains regardless of the efforts which may or may not be made by the employee himself. Indeed, in practical terms, it may well be that an employee who is least able to be effective on his own behalf may be most in need of the protection offered by section 68.

44. This does not mean that in evaluating the union's conduct, an employee's own behaviour will be ignored by the Board. To the extent that such behaviour forms part of the backdrop or context against which the union's actions will be assessed, it is one of many facts which the Board may consider in arriving at a decision in appropriate cases. While it does not relieve the union of its responsibilities under the duty of fair representation, it may help to shape the contours of that duty in particular cases.

45. In this case, it became evident that Mr. McLeod was not a resourceful or knowledgeable person with respect to the kinds of matters described above. It was also clear that it would have been more difficult for him to speak to employees directly since he no longer had access to the plant and did not have many of their names, let alone their addresses and telephone numbers. Certainly there is no suggestion that Mr. McLeod obstructed or otherwise impeded the efforts of the union on his behalf. In these circumstances, I cannot accept the suggestion that Mr. McLeod's efforts, or lack thereof, in some way explain or ameliorate the approach taken by the union.

46. Taking the evidence as a whole, I conclude that the respondents' representation of Mr. McLeod was so uncaring and indifferent as to be characterized as arbitrary and to constitute a violation of section 68. Pursuant to section 89, the Board directs the respondent trade union and the employer Camco Inc. to forthwith refer Mr. McLeod's grievance to arbitration by a sole arbitrator and further directs that the time limits set out in the collective agreement shall not bar the referral. The Board remains seized of this complaint in the event that it becomes necessary to determine any apportionment of compensation between the employer and the union or any other problems of implementation which may arise.

0020-85-R Canadian Union of Public Employees, Applicant v. Mississauga Public Library Board, Respondent

Bargaining Unit - Certification - Whether pages should be excluded from a unit composed of part-time employees and students employed during the school vacation period in the city's library system - Pages are part-time students regularly employed during the school term for not more than 24 hours per week - On community of interest grounds pages included in unit - Certification application dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *H. Goldblatt*, *Paul Jordison*, and *Caroline Lipscombe-Edwards* for the applicant; *C. E. Humphrey* and *Noel Ryan* for the respondent.

DECISION OF THE BOARD; April 23, 1987

1. In this application for certification, the parties were substantially agreed with respect to a description of an appropriate bargaining unit comprised of part-time employees and students employed during the school vacation period. The following description incorporates the extent of their agreement:

All employees of the respondent in Mississauga, Ontario, regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period, save and except department/branch heads, business manager, secretary to the business manager, secretary to the chief librarian and his/her assistant, payroll/personnel officer, and persons above such ranks.

The issue which separates the parties from a complete agreement is whether pages should be excluded from or included in the bargaining unit. The applicant contends that pages should be excluded from the bargaining unit because they do not share a sufficient community of interest with those employees whom the parties have agreed are included in the unit. The respondent takes the position that pages share a substantial community of interest with other employees who would be included in the unit, and, therefore, should not be excluded. Pages are high school students regularly employed during the school term for not more than 24 hours per week. Therefore, to that extent, they fall within that part of the unit description which covers "part-time employees" rather than that part which covers "students". While there is some evidence that a few pages may occasionally be employed during the school vacation period and, if pages are included in the bargaining unit, would fall within the "student" part of the unit, the pages at issue are those employed during the school term. Therefore, if the Board excludes them from the bargaining unit, it would be excluding a group or category of part-time employees.

2. Where, as here, part-time employees and students have been excluded from a bargaining unit of full-time employees, the Board has tended, as a matter of policy, to link students with part-time employees in order to make available to students a bargaining unit, other than the unit of full-time employees, which will have some viability in collective bargaining. See the Board's decision in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. March 324. In consideration of that policy, where there are both part-time employees and students employed during the school vacation period and the parties cannot agree whether they should be combined in a single bargaining unit, the Board will likely keep the two groups together, having regard to the community of interest which usually exists between them, as well as for the Board's concern over undue fragmen-

tation of bargaining units. Again, see the Board's decision in *Inter-City Bandag, supra*. The parties to the instant application are not disputing that policy. Their dispute is whether, in spite of that policy, the circumstances of this case warrant excluding one group or class of part-time employees, pages, from a unit otherwise comprised of all part-time employees and students employed during the school vacation period.

3. As a result of the dispute between the parties about pages, a Board officer was authorized to enquire into and report to the Board on whether pages shared a community of interest with the other employees in the proposed bargaining unit. Following the issuing of the officer's report to the Board and to the parties, a further hearing was held before the Board in order for it to receive the submissions of the parties with respect to the conclusions which the Board should reach on the basis of the officer's report.

4. The parties have defined the bargaining unit issue as one of community of interest, but the true issue is what grouping of employees would be appropriate for collective bargaining purposes. As the Board noted in its decision in *Hospital for Sick Children*, [1985], OLRB Rep. Feb. 266, at paragraph 17, deciding what is appropriate is:

"...a matter of balancing competing considerations, including such factors as: whether the employees have a community of interests having regard to the nature of the work performed, conditions of employment, and their skills; the employers' administrative structure; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed or from fragmentation of employees into several units, and so on."

5. Pages are employed by the respondent either as public service pages in the respondent's branch libraries or as technical service pages in its technical services branch. The technical services branch provides various services to the respondent's library system. These include computer services, the acquiring of books and cataloguing them on the catalogue computer, ordering and distributing library supplies, arranging book displays, sorting and distributing mail and recording overdue books. The public service aspect of the respondent's library system provides the public with access to the system's repository of materials by assisting and guiding the public in accessing and finding library materials. Similar qualifications are required of both public service and technical service pages. They are fairly elementary. The students should have good school grades; be "readers"; preferably have done volunteer work in a school library, therefore have some familiarity with library work; be able to type; be personally neat and display a sense of decorum and responsibility. The technical services branch requires a typing speed of 25 words per minute on a computer terminal and it tests page candidates for that speed. It also requires an ability to handle clerical work and to do repetitive work without letting boredom interfere with the task at hand.

6. Public service pages spend 60 to 70 per cent of their time performing two, simple, repetitive tasks: sorting books and periodicals and returning them to the correct shelf space; "reading the shelves" for improperly shelved books and periodicals and restoring them to their correct positions. The rest of their time is spent on such tasks as receiving and checking incoming books, emptying the book drop, checking shelves for reserve books, locating books for the public, assisting the public with the catalogue terminal, using the terminals, typing and filing cards and showing films. Technical service pages move between the three sections of the technical services branch: acquisitions, computer services and cataloguing. Technical service pages prepare simple book orders on the computer system used for that purpose by following simple instructions for activating the proper program. Pages working in the acquisitions section spend approximately half of their time

on ordering. Technical pages also unpack book shipments and check them against invoices; prepare and affix bar code labels and envelope pockets for control cards on paperback books; withdraw books from the library system and sort them for sale or destruction; order display books; routinely clean the computer room; do simple data entry on the computers and make simple corrections to computer bases on specific instruction from senior part-time and full-time staff.

7. Pages and the first two levels of library assistants ("LA 1 and LA 2") do share to some degree some factors in common, such as: the skills required to perform their work, the duties performed and the conditions under which they are performed. To briefly review some of them, LA 1's and pages may be involved in checking the shelves for reserved books, emptying the book drop, typing the file cards, and checking books in and out of the library. Technical service pages and LA 1's both use the computer terminals to manipulate and record information regarding library books. Further, technical services pages and other library staff handle and prepare paperback books for the shelves. Both public service and technical service pages, on occasion, fill in for absent library staff at various skill levels. While they are not capable of performing the complete job of any of the other part-time employees or of the full-time employees, they are able usually to do sufficient of the tasks to "keep the job going". Sometimes this may involve them in working at the reference desk and in operating audio visual equipment. Qualifications and skill requirements for pages and part-time LA 1's include the ability to type at least 25 words per minute, demonstrating an interest in library work and being of a responsible and dependable nature.

8. The working conditions for pages and other part-time employees are the same. They are paid a wage for the actual hours worked. They get two paid 15 minute breaks for each four hours worked and an unpaid half-hour lunch period. They are covered by the same policy respecting time off and all time off is unpaid. They have no fringe benefits except as required by statute. Pages, generally, work fewer daily and weekly hours and fewer days per week than other part-time employees. The same attendance records are kept for all part-time employees, including pages.

9. The evidence in the officer's report shows the pages to be integrated into the work routines of the respondent's library system in various ways. While pages are relied upon to perform many of the routine, repetitive and menial tasks like checking books, shelving books, reading the shelves, cleaning the computer room and performing simple data entry tasks on the computer, they are used in this fashion so that other staff are free to do the more complex functions. Were it not for the pages doing these tasks on a regular basis, the work would back up until it was done by other employees. For example, if technical service pages do not do the routine data entries on the catalogue computer each day, a backlog develops and the regular computer operators have to be diverted from doing the more complex data entries to clear the backlog. Similarly, part-time library assistants in the acquisition section of technical services spend about 20 per cent of their time preparing the simplest kind of book orders, while the pages spend approximately half of their time on that work. It is obvious that the library assistants' work routine would have to be altered but for the use of the pages in the ordering function. Whenever there is a "rush" of work, all library staff will pitch in to do such tasks as unpacking book shipments, emptying book drops, shelving books and reading the shelves. At these times, pages are working alongside of other part-time and full-time employees. Tasks which the pages do on a regular basis and are shared with other part-time and full-time staff include ordering display books, cataloguing the withdrawal of books from the system, unpacking and checking book shipments, performing simple data entry and data corrections on the computers and preparing paperback books for the shelves.

10. In spite of some of the apparent overlaps in function between pages and LA 1's, sixty to seventy per cent of their time is spent performing two, simple, repetitive tasks. These are sorting books and periodicals and putting them back on the shelves in the proper places and "reading the

shelves” for improperly shelved books and periodicals and correctly relocating them. While LA 1’s and LA 2’s do shelf books, if required, the impression which the Board gets from the evidence is that the prime responsibilities of LA 1’s and LA 2’s usually involve them in performing work which is less repetitive and routine and is more complex than shelving books and periodicals and reading shelves. For example, in the branches they would work at the desk where public contact is involved. Therefore, they need to know something of the library system and have the interpersonal skills to deal with the public. They may answer reference questions, pages must not. Pages must refer reference questions to other part-time or full-time staff. In technical services, LA 1’s and LA 2’s initiate the more complex book orders, and enter books and bar code numbers into the computer catalogue system. The LA’s make more independent, although still routine, decisions than pages respecting the use of the computer data bases and the entering of data.

11. There are some other relatively significant differences between pages and other part-time employees in terms of how they are hired and how their rates of pay are established. All part-time staff other than pages are hired to fill specific vacancies in classifications which mirror those of the jobs in the full-time bargaining unit. Once employed, part-time employees may expect to advance as their skills and experience increase and opportunities arise to post for job vacancies which become available. Part-time employees are paid the base rate of the equivalent full-time classification. Pages, on the other hand, are not hired to fill vacancies in specific job classifications, except insofar as the term “page” may be a classification, nor are their job functions reflected by a like position in the full-time bargaining unit. Pages are paid the statutory minimum wage rate for their age and receive a predetermined yearly increase of 5¢ per hour for each year of experience. There is no relationship between the rate of wages paid to pages and those rates paid for classifications in the existing full-time bargaining unit. When a page fills in for another part-time employee, he might perform tasks he is not usually involved in most of the time. When a part-time employee fills in for someone in the full-time bargaining unit, he would normally perform the same tasks which he performs as a part-time employee. Furthermore, as a general rule, pages work in that capacity for their entire tenure as library employees, whereas other part-time employees will advance “through the ranks” as positions become available at increasingly higher levels.

12. Applicant counsel points to these differences as demonstrable of the pages and other part-time employees not sharing sufficient community of interest to be lumped together in a single bargaining unit. Counsel submits also that the applicant and other municipal library boards have agreed that the two groups should not be combined for collective bargaining purposes and that the Board has accepted their agreements in defining appropriate bargaining units in certification applications. He gave some half-dozen examples in the three to four years preceding this application wherein pages were excluded from bargaining units for which the applicant was certified by the Board. In these examples, the parties went on to conclude a collective agreement. Their ability to do so, counsel argues, attests to the viability of the bargaining unit. Counsel also gave an example where, on the agreement of the parties, the Board found a tag-end unit of part-time employees to be appropriate for collective bargaining. The unit was comprised only of pages, but the applicant and the library board employer were able to conclude a collective agreement. Counsel cites this as an example that pages do have a capability of organizing themselves for collective bargaining and can constitute a viable unit of employees for collective bargaining purposes. Counsel cited also a number of other examples where the applicant had negotiated collective agreements with library boards for units of employees which excluded pages as support for his proposition that the parties to collective bargaining in public library settings have found it conducive to an effective collective bargaining relationship to exclude pages from units of other library employees.

13. It appears to the Board that the applicant, in conducting its organizing campaign in the instant case, relied on the recognition of library employers with whom it bargains that pages should

not be intermingled with other library employees for collective bargaining purposes and on the fact that the Board in a number of cases had accepted the parties' agreement on such arrangements. In any event, applicant counsel argues that, to require the applicant to organize pages would seriously impede access to the collective bargaining process for the other part-time employees, a consequence which runs counter to one of the fundamental objectives of the *Labour Relations Act*; that is, to enable employees to join together for collective bargaining purposes. In these circumstances where pages do not share sufficient community of interests with other part-time employees, where units of library staff excluding pages have demonstrated their viability for collective bargaining and where excluding pages would accommodate the wishes of the part-time employees to be represented in collective bargaining, counsel contends that the Board should exclude pages from the unit of part-time employees and students employed during the school vacation period. Moreover, counsel submits, the Board can be reasonably assured that the pages can stand alone as a viable unit if they wish to be represented in collective bargaining at a later date.

14. Even were the Board to agree with applicant counsel that there is little community of interest between pages and other part-time employees, that units excluding pages are viable for collective bargaining purposes and that to require the applicant to organize pages might impede access to collective bargaining for other part-time employees, there are other factors which, in the Board's view, point towards not excluding pages. Foremost amongst these is the questionable viability of a bargaining unit comprised solely of pages. In spite of the one example given by applicant counsel during his submissions, and even though it might be argued that pages who work nine months out of twelve and who have a potential of working for four academic years as high school students would have a greater opportunity for self-organization than students working during a three-month school vacation period, their bargaining strength would be very limited relative to the other part-time employees. The pages might also suffer diminished opportunity for filling in for employees in the part time or full time bargaining units because it is not uncommon for conditions to be negotiated into a collective agreement which restricts access to bargaining unit work by persons who are not members of the bargaining unit. At the same time there would be an increased opportunity for disputes arising over the allocation of work. From the respondent's point of view, there is the risk of diminished flexibility in using pages to relieve other employees in their more routine and repetitive tasks during periods of sudden, short term increases in workload or unexpected absences of employees.

15. The evidence before the Board demonstrates that the respondent has made pages an integral part of the functioning of its library system. It well may be that menial, routine and repetitive tasks account for 65 per cent of the work which pages perform, but there is no evidence of it being so incidental to the operation of the respondent's library system as to set them apart from the other library employees. To the contrary, when pages are not available, their work must be performed by other staff. It is clear also that even those tasks which account for the majority of pages' working time cause them to have regular, on-going inter-relationships and inter-change with other part-time and full-time staff. While the way an employer chooses to organize his enterprise is not necessarily determinative of what grouping of employees would constitute a unit appropriate for collective bargaining purposes, in the circumstances of this case and in the absence of some compelling reason to split off the part-time employees who are pages from the other part-time employees and in so doing create a potential for three bargaining units instead of two, and the potential problems which often accompany such divisions in the work force, the Board is satisfied that the appropriate unit in this case is the more comprehensive unit of all part-time employees and students employed during the school vacation period. As the Board stated in its decision in *Inter-City Bandag, supra*, that also is the unit which the Board usually finds to be appropriate when both groups are excluded from an existing unit of full-time employees, as is the case here.

16. The Board finds, therefore, that all employees of the respondent in Mississauga, Ontario, regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period, save and except department/branch heads, business manager, secretary to the business manager, secretary to the chief librarian and his/her assistant, payroll/personnel officer and persons above those ranks, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The respondent has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list, in accordance with the *Labour Relations Act* and the Rules of Procedure under the Act. Having regard to the list of employees and the Board's finding with respect to the appropriate bargaining unit, the Board is satisfied that there were 192 employees in the unit at the time the application was made.

18. The applicant has filed documentary evidence of membership consisting of combination applications for membership and receipts. It filed 49 such documents, 44 of which coincide with the names of employees in the bargaining unit. The membership evidence is supported by a duly completed Form 9 - Declaration Concerning Membership Documents.

19. The Board is satisfied, on the basis of all the evidence before it, that less than forty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 15, 1985, the terminal date fixed for this application and the date which the Board determines under Section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under Section 7(1) of the Act.

20. This application is dismissed.

2386-86-R Energy and Chemical Workers Union, Applicant v. Mobil Chemical Canada, Ltd., Respondent

Bargaining Unit - Certification - Employer operating two plants within same municipality - Union organizing only one plant - Whether separate bargaining units appropriate - Substantial community of interest among employees at both plants - Single plant unit not appropriate - Application dismissed

BEFORE: Robert D. Howe, Vice-Chair, and Board Members R. J. Gallivan and Janis Sarra.

APPEARANCES: Eric Batten and William Sinclair for the applicant; W. Jason, M. Hanson, Jack Smalley and D. E. Valcamp for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER R. J. GALLIVAN;
March 31, 1987

1. This is an application for certification in which the applicant requested that a pre-hearing representation vote be taken pursuant to section 9 of the *Labour Relations Act*.

2. In an unreported decision dated December 10, 1986 in this matter, another panel of the Board wrote, in part, as follows, in directing that a pre-hearing representation vote be taken:

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties disagree about the appropriate bargaining unit description. The applicant proposes the following unit: "all employees of the respondent in its Plastic Division at 321 University Avenue, Belleville, Ontario save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period". The respondent proposes the following description: "all employees of the respondent in Belleville, Ontario, save and except forepersons, persons above the rank of forepersons, office and sales staff, and students employed during the school vacation period". The respondent's proposed unit would include its employees in the Film Division located at 323 University Avenue, as well as its employees at 321 University. The issue of the appropriate bargaining unit can be addressed by the parties at a hearing held after the pre-hearing representation vote has been held.

4. The Board must then determine the appropriate bargaining unit. If the Board determines that the employees at both locations are included in the unit appropriate for collective bargaining, the applicant would not have been entitled to a pre-hearing representation vote because it does not appear to have the support of not less than thirty-five per cent of those employees. The Board determines that the voting constituency will be:

All employees of the respondent in its Plastic Division at 321 University Avenue, Belleville, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period.

It appears to the Board on an examination of the records of the applicant and of the respondent that the applicant satisfies the requirement that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made....

5. The Board hereby directs the taking of a pre-hearing representation vote of the employees in the voting constituency described in paragraph 4 above.

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8. The Board further directs that the ballot box be sealed and the votes not counted until further order of the Board.

9. This matter is referred to the Registrar to schedule a date for hearing the parties' submissions on the appropriate bargaining unit.

3. Pursuant to that direction, a pre-hearing representation vote was taken on December 21 and 22, 1986.

4. The matter was subsequently scheduled for hearing before this panel of the Board on January 29, 1987 for the purpose of hearing the parties' submissions on the appropriate bargaining unit. At that hearing, counsel for the respondent stipulated the facts on which his client relies. After considering the matter during a recess granted for that purpose, Eric Batten, the applicant's representative, advised the Board that the applicant did not disagree with any of the facts stipulated by counsel for the respondent, but wished to call William Sinclair as a witness to add to those facts and clarify them. He further indicated that he was prepared to have the Board treat as undisputed facts the facts stipulated by counsel for the respondent, subject to additions and clarifications by Mr. Sinclair, an electrical mechanic who has been in the employ of the respondent for over fifteen years. (Following Mr. Sinclair's testimony, the respondent was given an opportunity to call reply evidence but declined to do so.) Accordingly, the facts set forth below are based upon the aforementioned stipulated facts, as amplified and clarified by the testimony of Mr. Sinclair.

5. As indicated above, the respondent currently operates two plants in Belleville: its Plas-

tics Division Plant (the "Plastics plant") located at 321 University Avenue, and its Films Division Plant (the "Films plant") located at 323 University Avenue. The Plastics plant has been in operation for over fifteen years. As of the date of the application, there were 53 employees working at that plant, within the ambit of the bargaining unit proposed by the applicant. In addition to that plant, the respondent's Plastics Division has an off-site warehouse facility in Belleville. Two hourly rated employees rotate to that warehouse from the Plastics plant at two-week intervals.

6. When the respondent decided to expand its Belleville operations to include films, it acquired from a competitor a "mothballed" plant at 323 University Avenue, a few hundred metres away from its existing plant. A number of employees from the Plastics plant were transferred to the Films plant when the latter commenced operation in that location about seven years ago. As of the date of this application for certification, there were approximately 76 persons employed at the Films plant who would fall within the bargaining unit if it were to include that plant, as proposed by the respondent.

7. Both plants convert plastic resin pellets into plastic packaging material by means of a process which involves placing the pellets and other additives in a hopper from which they are fed into an extruder. After being melted, the material is forced through a die from which it emerges as a thin plastic film. In the Plastics plant, polyethylene pellets (and other additives) are used primarily to produce plastic bags for consumer use, although they are also used to produce industrial stretch film for use in wrapping pallets in industrial settings. In the Films plant, polypropylene pellets (and other additives) are used to produce plastic packaging films for use by other manufacturers in packaging their own products.

8. Employees at the two plants perform similar tasks and use similar skills. An identical wage structure applies to employees at both plants, and they all receive the same benefits. Each plant has a mix of seven-day rotating operations and five-day rotating operations.

9. Each plant has its own manager, supervisors, sales force, and shipping and receiving department. However, there is a single personnel department (located at 323 University Avenue) which services both plants. This department includes the personnel manager for both plants, another individual who is the safety and training manager for both plants, and a third person who is the wages and benefits clerk for both plants. The personnel department approves all hires, discharges, disciplinary actions, promotions, demotions, and appraisals. Job applicants are screened by the personnel department and successful applicants are placed on a waiting list from which they are assigned to the first available job in either plant. There is one employee handbook for both plants, and the same personnel policies are applied to both of them. The same merit review cycle is used at both plants, and the same forms are used at each plant to administer the respondent's merit review programme, which is also common to both plants.

10. Job openings in each of the two plants are posted in both plants. Where two applicants are equally qualified, company-wide seniority becomes the governing factor in determining who will be promoted. In the last year there have been about four employee transfers between the two plants. The aforementioned initial transfer of employees from the Plastics plant to the Films plant and subsequent transfers through job postings have resulted in a situation in which approximately 30% of the Film plant employees have previously worked in the Plastics plant, and approximately 15% of the Plastics plant employees have previously worked in the Films plant. Maintenance employees from the Plastics plant occasionally go to the Films plant to use various equipment at that plant, including electronics equipment and the larger, better-equipped lathe which is located there. The respondent also has a group of temporary employees who are called in to work from time to time on specific tasks or for specific periods of time. Those employees may be assigned to

work in one plant for a specific term or task, and subsequently be assigned to work in the other plant for another specific term or task.

11. Each plant has a driveway and a parking lot. However, there is also a private drive which runs parallel to University Avenue and connects the two driveways. Since each plant has its own lunch room, employees from the two plants do not tend to socialize with one another on a daily basis. However, the two plants have a number of joint social and recreational activities, such as golf and hockey outings, Christmas parties, and summer picnics. The applicant has confined its organizational activities to employees in the Plastics plant, and has not attempted to organize the Films plant.

12. Where an employer carries on business at more than one plant within a municipality, the Board's general practice is to describe separate bargaining units for employees at each plant. However, the Board will depart from that general practice if the operations are integrated and the employees share a sufficient community of interest: *Faber-Castell Canada Limited*, [1986] OLRB Rep. Apr. 449. In *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260, the then Chairman of the Board wrote, in part, as follows concerning the approach which the Board has generally adopted in such cases:

12. Section 6(1) of *The Labour Relations Act* charges the Board with the responsibility of determining "the unit of employees that is appropriate for collective bargaining." The Act, however, does not furnish precise criteria of "appropriateness." Consequently, the Board has developed certain broad policy guidelines which attempt to balance the right of self-organization guaranteed in section 3 of the Act with the requirements of a viable collective bargaining relationship. There is no lack of cases where the Board has had to choose between single plant or location bargaining units and multiplant or location bargaining units in trying to strike this balance. Generally, unions will advocate the former (since, although they may be more difficult to service, they are generally easier to organize) while employers will generally advocate the latter (since they are generally more difficult to organize but also because larger bargaining units present the employer with a more easily administered and potentially less disruptive collective bargaining relationship)....

13. In determining the appropriateness of bargaining units which include employees at more than one location the Board has outlined certain fundamental criteria as in *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526. (For an excellent and recent review of this see *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250). The criteria are: (1) community of interest of the employees; (2) centralization of managerial authority; (3) economic factors; and (4) source of work. The first criterion has been subdivided further to include: the nature of work performed, the conditions of employment, the skills of employees, administration, geographic circumstances, and functional coherence and interdependence. It has been pointed out on numerous occasions that the factors are obviously interdependent and that all factors do not take on the same weight in any given case. Moreover, they must be considered in light of the purpose of the Act which is to facilitate employee access to collective bargaining. The Board has been careful to avoid an overly technical or rational process to collective bargaining structures in order not to frustrate employee wishes....

See also *Murray G. Bulger & Associates Limited*, [1985] OLRB Rep. March 458, and *F. W. Woolworth Co. Limited*, [1981] OLRB Rep. June 653.

13. The Board has recently summarized its jurisprudence concerning bargaining unit configuration in *Harlequin Enterprises Ltd.*, [1987] OLRB Rep. Feb. 226. In that decision the Board wrote, in part, as follows:

14. The case law recognizes that the Board must determine the appropriate bargaining unit, in accordance with section 6(1) of the Act, in the circumstances of each application but that more than one unit may well be "appropriate" in respect of a single employer: *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Parnell Foods Limited*, [1969] OLRB

Rep. Apr. 38; *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266; *National Trust*, [1986] OLRB Rep. Feb. 250. In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization: *The Board of Education for the City of Toronto*, *supra*; *Tip Top Tailors*, [1979] OLRB Rep. May 445; *Canada Trustco*, [1977] OLRB Rep. June 330. This sensitivity led the Board to acknowledge the appropriateness of bargaining units consisting of single plants within a municipality to facilitate collective bargaining in the retail industry in particular: *K-Mart Canada*, [1981] OLRB Rep. Sept. 1250; see also *Canada Trustco*, *supra*.

15. Further, the Board recognizes that a multiplicity of bargaining units generally has adverse consequences for the future bargaining relationship of the union and employer, such as, increasing the likelihood of strikes, increased complexity in administering several collective agreements, the triggering of jurisdictional disputes and employee 'enclaves' coextensive with each bargaining unit: *Board of Governors of Ryerson*, [1984] OLRB Rep. Feb. 371; *The Globe and Mail Limited*, [1976] OLRB Rep. Nov. 662. Conversely, broader based units enhance administrative efficiency, employees' lateral mobility and industrial stability and provide a common framework for employment conditions: *Insurance Corporation of British Columbia*, [1974] 1 Can. LRB 403; *Ontario Hydro*, [1980] OLRB Rep. June 882. Where the more comprehensive unit would not operate to seriously impede or delay employee access to collective bargaining, the Board has favoured the broader grouping: *Board of Governors of Ryerson*, *supra*; *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459. In short, the Board prefers the most comprehensive unit that is viable for labour relations purposes in the context of a policy of facilitating employee access to collective bargaining: *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. May 759.

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17. The concept of community of interest was a common sense acknowledgment that it generally made no labour relations sense to "lump together" groups of employees whose interests were so disparate that a bargaining agent could not readily seek to respond to employees' concerns through collective bargaining. The notion of community of interest was itself elaborated and refined into a number of constituent elements, as set out in *Usarco*, *supra*, including the nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances and functional coherence and inter-dependence. In *Usarco*, the Board also looked to the centralization of managerial authority, the economic factor and source of work. It must be emphasized, though, that community of interest is not an "all or nothing" phenomenon. Rather, all employees of a single employer share a basic community of interest which increases for various sub-groups of those workers. The question is not "is there a community of interest amongst the employees for whom a union seeks certification?" but "is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?". The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but, rather, goes to the issue of viability: *Niagara Regional Health Unit*, [1975] OLRB Rep. Apr. 376; *Bestview Holdings*, [1983] OLRB Rep. Aug. 1250; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7. It is the question of viability which is paramount and that may require bargaining units defined in terms of community of interest or some broader reference where sound labour relations policy reasons so require: *The Children's Aid Society* case, [1976] OLRB Rep. Dec. 861.

14. Having regard to the criteria and labour relations policy considerations set forth in that jurisprudence, we have concluded that there is a substantial community of interest among the employees at the aforementioned two plants, and that to separate the employees at the Plastics plant from the employees at the Films plant, as requested by the applicant, would result in undue fragmentation of the respondent's work force, thereby creating a situation which would not be conducive to viable collective bargaining. In reaching that conclusion, we have taken into consideration a number of factors. As indicated above, employees at both plants use similar skills to perform similar work in plants only a few hundred metres apart, which both convert plastic resin pellets into plastic packaging material. An identical wage structure applies to employees at both plants

and they all receive the same benefits. Other conditions of employment, such as the aforementioned mix of seven-day rotating operations and five-day rotating operations, are also common to both plants. Although each plant has its own manager and supervisors, there is a single personnel department which approves all hires, discharges, disciplinary actions, promotions, demotions, and appraisals. The fact that job openings in each of the two plants are posted in both plants further evidences their functional coherence and interdependence. The granting of a bargaining unit confined to employees at the Plastics plant, with the obvious potential for a further (production) bargaining unit at the Films plant, could hinder transfers, postings, and promotions between the two locations. It might also give rise to industrial relations problems in the event that the respondent wished to continue to permit maintenance employees from the Plastics plant to go to the Films plant to use various equipment at that plant. The use of the aforementioned group of temporary employees to perform specific tasks at the two plants from time to time might also be hampered by such a bargaining unit configuration. As indicated above, in exercising its power under section 6(1) of the Act to determine the unit of employees that is appropriate for collective bargaining, the Board considers the effect of a broader based unit upon employee access to collective bargaining in the industry to which the application pertains: see, for example, *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. In the instant case, the applicant has confined its organizational activities to employees in the Plastics plant, and has not attempted to organize the Films plant. However, having regard to all of the circumstances, including the extent to which the chemical industry has already been organized in Ontario, the Board does not consider that the larger unit proposed by the respondent in the circumstances of this case would significantly impede employee access to collective bargaining. In reaching this conclusion, we have balanced the interests of those employees who have signified their desire to bargain collectively and be represented by the applicant, the substantial community of interest shared by those employees and the employees of the respondent at its Films plant, and the potential for undue fragmentation which would be created by confining the bargaining unit to the Plastics plant. Our balancing of all of those interests in the circumstances of the present case has led us to conclude that the Plastics plant should not comprise a bargaining unit separate from the Films plant.

15. Having had the benefit of reading the carefully reasoned dissent of our colleague, Board Member Sarra, we respectfully disagree with her conclusion that a single-plant bargaining unit is appropriate in the circumstances of this case. Although the employees at the Plastics plant undoubtedly share a community of interest, there is also a substantial community of interest among the employees at the two plants. Moreover, the Board's longstanding aversion to fragmentation reinforces the appropriateness of a broader-based, municipal-wide bargaining unit in the circumstances of this case. The unit sought by the applicant could give rise to labour relations difficulties not only for the employer (which, as noted in *Harlequin*, *supra*, is a relevant consideration), but also for the employees whom the applicant seeks to represent, in that it might well hinder transfers, postings, and promotions between the two plants, and give rise to the other potential labour relations problems described above. We would also note that there is no evidence or factual agreement before us with respect to the applicant's "organizing pattern"; the parties merely agreed that the applicant has confined its organizational activities to employees in the Plastics plant, and has not attempted to organize the Films plant. As noted above, we have duly considered the potential effect of a broader based unit upon employee access to collective bargaining and have concluded that there is nothing to suggest that the larger unit proposed by the respondent in the circumstances of this case would significantly impede employee access to collective bargaining.

16. For the foregoing reasons, the Board, in the exercise of its discretion under section 6(1) of the Act, finds that all employees of the respondent in Belleville, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed dur-

ing the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. The Board further finds that less than thirty-five percent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made. The application is therefore dismissed.

18. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty-day period.

DECISION OF BOARD MEMBER JANIS SARRA;

1. I do not substantially disagree with the facts as articulated in the majority decision. However, there were additional agreed upon facts to which I would have given greater weight, and based upon the tests developed by the Board in determining bargaining unit description, I would have found in favour of the applicant's proposed bargaining unit.

2. As has often been said by the Board, the description of bargaining units is a discretionary decision by the Board and is one that requires an evaluation of the facts and a balancing of interests to ensure the Board arrives at a decision that makes labour relations sense. In *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250 the Board wrote:

The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case.

3. In assessing and balancing these objectives, the Board has looked to the criteria articulated in *Usarco Limited*, [1967] OLRB Rep. Sept. 526. This test included assessing:

- (1) centralization of managerial authority;
- (2) economic factors;
- (3) source of work; and
- (4) community of interest, determined by the nature of work performed, skills of employees, conditions of employment, administration, geographic circumstances and functional coherence and interdependence.

4. The second "test" that has been developed by the Board is the assessment of the organizing pattern of the union in a particular campaign, and acceptance of that pattern where more than one bargaining unit may be appropriate. To quote the Board in *K-Mart Canada*, *supra*:

However, the Board recognizes that there may be more than one appropriate unit in any given case. *Where there is more than one appropriate unit the Board will attempt to accommodate the*

desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern of organization.

[emphasis added]

5. Similarly in *Alltour Marketing Support Services Ltd.*, [1982] OLRB Rep. Oct. 1383, the Board in granting a bargaining unit of employees in one branch of an operation at the same location, adopted and clarified this test. The Board wrote:

On all the facts, there simply is no compelling reason for the Board to depart from the pattern of organizing adopted by the applicant and its supporters in this campaign.

6. The final test developed by the Board over time has been the question of viability of collective bargaining in determining appropriate bargaining units. In *Harlequin Enterprises Ltd.*, [1987] OLRB Rep. Feb. 226, decision dated February 3, 1987, as yet unreported, the Board provided a synthesis of Board jurisprudence and thinking on this question. The Board wrote:

The case law recognizes that the Board must determine the appropriate bargaining unit in accordance with section 6(1) of the Act, in the circumstances of each application, but more than one unit may well be "appropriate" in respect of a single employer (cases cited). In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization.

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The question is not "is there a community of interest amongst the employees for whom a union seeks certification?" but "*is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?*" The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining.

In *Harlequin*, the Board was faced with a multiplicity of possible bargaining unit descriptions. It chose the applicant's bargaining unit not necessarily because it was the *most* appropriate or *only* appropriate bargaining unit but because it met the test, *there was a sufficient community of interest amongst those employees for whom certification was sought that the resulting unit was viable for collective bargaining purposes.*

7. All of these tests have their application in this case. Turning first to the test articulated in *Usarco Limited*, *supra*:
Centralization of Managerial Authority

The respondent submitted that there were separate plant managers at each plant, with separate lines of supervision at each plant. Operating levels of authority did not come together until two levels above, and that was with an individual in the United States. This supports the applicant's submission that the managerial authority, within Canada, is clearly separated.

It was agreed by both parties that the day-to-day operations were separately managed. The employees report to their separate operations and receive day-to-day instruction from their respective supervisors. Although the plant managers occasionally confer, there was no evidence to indicate that it was with respect to managerial authority or any centralized form of operation. Employees never report to managers in the other plant, with the exception of a few temporary workers used from time to time. There is no intermingling of supervisors.

Each operation has its own maintenance and production operations, and reporting and accountability for those operations is under the authority of each plant manager respectively. Although there is a common personnel department, the parties agreed that hiring, firing, promotion and dis-

cipline were done by personnel in conjunction with the separate managerial staff in each operation. This was reinforced by the evidence given by Mr. William Sinclair, a mechanical/electrical employee of 16 years who testified that employees are disciplined by their own supervisor within the plant.

Vacations and leave are scheduled separately by supervisors within the two plants, and such scheduling has no impact beyond the individual operation.

8. Economic Factors

The Board has said that economic implications from both the perspective of employee and employer must be taken into consideration. In this case, the economic factors speak to more than one bargaining unit configuration. The parties agreed that the raw materials were different, polyethelene and polypropylene, but that they were both plastic pellets. No evidence was submitted with respect to common or different source for the raw materials.

It was agreed that the two plants had separate markets. The plastics plant produces plastic bags for consumer use. The films plant produces packaging for industrial use. The markets are consumer and industrial respectively. There are separate sales people with separate sales approaches and marketing strategies. There are also separate shipping and receiving operations.

The parties agreed on the earning situation, that the two plants generate separate profit and loss statements and separate production statements to assess production and economic viability, but also agreed that taxes are based upon consolidated earnings.

Jobs are posted simultaneously in both plants, but the policy is to promote internally within each plant first. However, company-wide hiring is relevant if qualifications are equal, and preference is given company-wide over outside applications. The respondent submitted that separation of the plastics plant as a bargaining unit might inhibit employee access to jobs in the other plant, but did not table evidence to explain how it reached that conclusion given that hiring now is done by qualification and seniority within each plant first, and company wide second as an existing company practice. The Board has addressed this particular issue in *OE Inc.*, Board File No. 1903-86-R, decision dated August 28, 1986, in which it wrote:

The respondent also argued that warehouse personnel would no longer have the opportunity for promotion to technician, we do not believe that such promotions would automatically or necessarily be foreclosed by certifying the proposed unit.

From the perspective of economic implications for employees, there were no submissions on possible downside economic benefits for employees if the Board were to grant the applicant's bargaining unit. The applicant in making submissions regarding the democratic right of these employees to union representation did make brief submissions on the possible positive economic benefits to employees.

9. Source of Work

The parties did not make submissions specifically on source of work, but separate markets would seem to indicate a separate demand for and source of production work.

10. Community of Interest

The nature of work, as the majority decision describes, is very similar, as are for the most part the skills required and the conditions of employment. In terms of administration the two operations

are separately administered, but with a common personnel department and a common health and safety manager. Prior to 1979 the Belleville operation was restricted to plastics and when Mobil decided to move into films production it purchased the separate, but proximate plant, further evidence of administrative viability and independence. Geographically, the plants are separate street addresses, but only "two football fields" apart.

Functionally, the two plants are not interdependent. The permanent regular workforce do not ever report to work at the other plant. The work although similar in nature, is not work that is at all interrelated or interdependent. The products are made for different uses and markets. Mr. Sinclair testified that on occasion, up to four times a year, a maintenance worker will go from the plastics plant to the films plant to use a lathe that the plastics plant does not have, but no work done there by these maintenance workers is related to the films work. There was no evidence that use of such equipment on occasion would be inhibited by the recognition of the plastics plant as a separate bargaining unit. There is no interchange or rotation of employees or work.

The workers at each plant have separate lunchrooms and thus do not talk or associate during breaks or lunchtime. There are four joint social events each year, but on a day-to-day and week-to-week basis, there is no intermingling of employees. This is reinforced by the fact that they arrive at, park and leave from their separate plants. Mr. Sinclair testified as an employee of long standing, that the employees while feeling a strong community of interest within the plant, feel that community of interest separate from the film workers.

Counsel for the respondent argued that by allowing the applicant's bargaining unit there would be undue fragmentation, but the company made no specific comment on how this might happen, aside from the promotion issue addressed above.

Based upon these agreed upon facts and applying the principles outlined in *Usarco, supra*, and other cases it is clear that the applicant can meet this test. There is sufficient separation of managerial authority, separate economic factors relating to production and marketing, and functional independence. The employees at the plastics plant do not have a clear community of interest with workers at the films plant as evidenced by infrequent contact and no related work. Further, the employees do have a strong community of interest within the plastics plant, with the same work place, intermingling at lunch and breaks, the interrelationship of plastics production work and common lines of managerial authority under the plastics plant manager. It is clear that the bargaining unit applied for meets the tests articulated in *Harlequin Enterprises Ltd., supra*, and other Board decisions that *there is a sufficient community of interest nexus amongst those employees in the plastics plant for which certification is sought to develop and sustain collective bargaining.*

11. The Board has recognized bargaining units at one location in a municipality and I would respectfully disagree with the majority at paragraph 14 of their decision, these have been in highly organized sectors as well as the more recent, special recognition the Board has given to the unorganized sector. For example in *Canadian Hanson and Van Winkle Company, Limited*, [1967] OLRB Rep. Nov. 756 the Board wrote:

In the light of the virtual absence of any interchange of production personnel, the lack of a community of interest by reason of the type of work performed by the employees of the plant and the foundry, and the separate and independent nature of the production operations at the two locations, despite common administration, the Board is of the opinion that a unit comprised of the employees of the respondent at its plant alone is appropriate for collective bargaining.

The Board has also recognized single location bargaining units within a municipality where there is a much more extensive degree of integration than in the present application. For example, in *F. W. Woolworth Co. Ltd.*, [1981] OLRB Rep. June 653 the Board decided:

However, we are satisfied that notwithstanding the fact that the respondent's warehouses show a high degree of integration insofar as the handling of merchandise is concerned, *the employees at Humberline do constitute a discrete group of employees* quite separate and apart from the other warehouse employees, and that the degree of staff interchange involving Humberline is not sufficient to detract from this fact. Further, although the employees at Humberline perform basically the same work as the employees in other warehouses, because of their being grouped together away from the other employees, and working under local supervision, we are of the opinion that *the employees at Humberline have a community of interest of their own quite separate and apart from the employees at the other warehouses. In the circumstances then, we are of the view that the employees at Humberline, with the appropriate exclusions, by themselves constitute a unit of employees appropriate for collective bargaining.*

[emphasis added]

In that case the Board found the employees at one warehouse constituted a unit of employees appropriate for collective bargaining even though the work in all the warehouses was the same, the merchandise was integrated and the company had one managerial structure. In the case now before the Board, production is not integrated, there are separate processes, separate markets and separate lines of management within the company within Canada. Although each case must be decided on its merits, it is clear that if *F. W. Woolworth Co. Ltd.* were even the low watermark in terms of a unit appropriate for collective bargaining, that the applicant in the case before us is well above that watermark, applying the tests articulated in *Usarco*, *supra*, and *Harlequin*, *supra*.

That case and others have application to the present case where there are a number of factors to weigh, but on balance, using the Board's criteria, the unit proposed by the applicant is appropriate.

12. This leads inevitably to the third test adopted by the Board in decisions such as *K-Mart*, *supra*, and *Alltour Marketing Support Services Ltd.*, *supra*, that given more than one appropriate unit, the Board will recognize the organizing pattern of the applicant.

13. The respondent admitted that it was "an agreed fact that the union attempted to organize only the plastics plant not the films plant." The union only sought to organize the plastics plant, it was a bargaining pattern of choice. As the Board articulated in *OE Inc.*, *supra*:

We find these principles attractive and adopt the test in *Alltour Marketing Support Services Limited* of whether there is a compelling reason to depart from the pattern of organizing adopted by the applicant and its supporters. As long as the unit proposed by the applicant is appropriate, on the basis of the principles enunciated in the Board's jurisprudence, the Board is prepared to accept the applicant's proposed unit.

14. The Board in that case goes on to distinguish a situation where the union wants a bargaining unit configuration because that is where its support lies from the situation where union support has not yet been determined and where the Board recognizes the organizing pattern of the union and its supporters within a plant. In *OE Inc.*, *supra*, the Board dealt with two groups of employees all working out of one building, the different areas connected by a large doorway. Giving recognition to the bargaining pattern of the union, the Board decided upon the bargaining unit proposed by the applicant.

15. In Board decisions such as *OE Inc.*, *supra*, and *Alltour Marketing Support Services Ltd.*, *supra*, specific reference is made to the pattern of organizing of the applicant and "its supporters in this campaign." These references are clearly to the organizing pattern of the specific applications for certification, not to the general organizing pattern of the union. This makes sense as the test, because a union may have different organizing patterns given the nature of a local community, the geographic region, the nature of production, office or service work etc. and the

makeup of the work force. Any organizing campaign must be sensitive to the wishes of the employees seeking certification and the campaign of organizing should reflect those needs and wishes. The tests cited above reflect that sensitivity and recognition of organizing patterns in a particular campaign.

Thus, I agree with the majority decision that we received no evidence with respect to the union's organizing pattern in general, but we received specific and agreed to facts that in this campaign the union's organizing pattern (with the support of long-time employees such as Mr. Sinclair who gave evidence) was to organize the plastics plant only. In my opinion the applicant has met the test articulated by the Board in *OE Inc.*, *supra*, that where *there is no compelling reason to depart from the pattern of organizing adopted by the applicant and its supporters*, "As long as the unit proposed by the applicant is appropriate on the basis of the principles enunciated in the Board's jurisprudence, the Board is prepared to accept the applicant's proposed unit." [emphasis added]

16. The applicant union, the Energy and Chemical workers, has met the tests required by the Board in determining whether the bargaining unit sought is appropriate for collective bargaining. The applicant has met the principles established in the Board's long-standing jurisprudence, has established that it is a unit with a *sufficient community of interest nexus* to collectively bargain, that it is *an* appropriate unit for collective bargaining and that its organizing pattern, specifically to organize the plastics plant only, has been recognized as an agreed upon fact.

17. For all these reasons I would have found the bargaining unit to be that requested by the applicant and I would have directed the ballots be counted.

2892-86-R Norris Transport Limited, Applicant v. Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent

Abandonment - Bargaining Rights - Termination - No negotiations taking place between the applicant and the respondent subsequent to the sending of a notice to bargain - No contact at all for one year - Events subsequent to the filing of the termination application of little probative value - Forgetting about unit not a valid explanation for inactivity - Representation vote ordered

BEFORE: Robert J. Herman, Vice-Chair, and Board Members J. A. Rundle and J. Sarra.

APPEARANCES: Patricia Conway, Phil Saunders and Gerald Gills for the applicant; Eric del Junco and Dan McIlravey for the respondent.

DECISION OF THE BOARD; April 13, 1987 as amended May 6, 1987

1. The name of the respondent is amended to read: "Teamsters Local Union No. 879, affiliated with the International Brotherhood of teamsters, Chauffeurs, Warehousemen and Helpers of America".

2. This is an application under section 59 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in a bargaining unit of drivers for the applicant.

3. For the most part the facts are not in dispute. The respondent was certified as bargaining agent of the applicant's employees on September 27, 1967. The respondent continued to represent the bargaining unit employees from that time until the time of this application. The most recent collective agreement between the parties expired on March 31, 1986. Shortly before that, around October, 1985, due to a reorganization of the applicant in an effort to maximize efficiency, the applicant put on a permanent lay-off a large number of employees in the bargaining unit, with the result that the bargaining unit was reduced from approximately 18 employees to 3. The size of the bargaining unit remained approximately three from October, 1985 to the present.

4. As the collective agreement was due to expire on March 31, 1986, the union served notice to bargain on the applicant by a letter dated January 9, 1986. The administrative system followed by the union noted dates of expiry for particular collective agreements and noted when notices to bargain had to be sent, and the union personnel accordingly automatically sent such notices. The union official with responsibility for this bargaining unit was Daniel McIlravey, a vice-president of the respondent. Since the notice to bargain sent on January 9 was sent automatically by union staff, McIlravey was unaware the notice had been sent to the applicant.

5. No negotiations took place between the applicant and the respondent subsequent to the sending of the notice to bargain. Indeed, there was no further contact between the applicant and the respondent from January 9, 1986, when the notice to bargain was sent, to the date of the filing of this decertification application, January 22, 1987.

6. On two occasions the company president, Phil Saunders, attempted to reach McIlravey by phone to suggest that they commence bargaining. Both in March and sometime during the summer of 1986, Saunders phoned McIlravey and, as he was not available at the time, left messages for McIlravey to return his call. Neither of those calls were responded to by the union.

7. Additionally, in the three month period from March to May of 1986, the union steward phoned McIlravey approximately four times, also in an effort to prompt the start of negotiations. The steward, Gerald Gills, knew bargaining unit employees were unhappy with the complete absence of bargaining activity, and he was trying to discover why no bargaining was taking place. For two of those phone calls, Gills left his name. No union official ever returned those calls. (Although the union argued that neither Saunders nor Gills left phone messages, we have found as a fact that they did. The union relied heavily on evidence that the union's office message books did not contain messages from either Saunders or Gills, but it did not call evidence from the individual responsible for the messages to attest to their accuracy. Accordingly, we gave little weight to this evidence of McIlravey.)

8. During this approximate twelve months of inactivity, no grievances were filed by employees and the applicant continued to honour all terms of the expired collective agreement.

9. During the hearing both parties attempted to lead evidence of events that had occurred subsequent to the filing of this application. Although we entertained evidence of such events and discussions (except where such evidence dealt with the employee wishes that they no longer wanted to be represented by the respondent, which evidence we did not allow, for reasons given at the hearing and in reliance upon Rule 73 and section 111 of the *Labour Relations Act*), we did not find such evidence particularly useful, except insofar as it touched upon the respondent's explanation for not having actively pursued its bargaining rights. Unless events subsequent to the filing of a termination application, in these circumstances, can shed some light upon why the union did not actively pursue bargaining, or upon any other matter relevant to our consideration (for example, whether there has been any prejudice to the employer or employees during the period up to the application date), such evidence is of little utility.

10. In his evidence, McIlravey explained the passage of twelve months on the basis he had forgotten about this bargaining unit. The notice to bargain was automatically sent by his office, and he would have no involvement with it except for receiving a copy, which he conceded he probably received but could not recollect. Although he also conceded that Saunders and the union steward, Gills, might well have phoned during the previous year, he testified they could not have left messages including their names, for the message book kept by his receptionist did not show that they had phoned. All messages were recorded by his receptionist, McIlravey testified, if callers left their names. Counsel for the respondent had with him those message books and there was no dispute that no messages from Saunders or Gills were recorded therein.

11. Based on these facts, the respondent submitted it had provided an explanation for the period of inactivity. Although the respondent conceded its actions were not justifiable, it argued that they were understandable in the circumstances. Counsel for the respondent further submitted that although Saunders and Gills might well have phoned, they could not have left their names. The message books did not indicate that messages had been left and they would certainly have been recorded in those books had either of them left such messages. Accordingly McIlravey would not have been put on effective notice they were trying to start bargaining. Counsel further submitted that in the circumstances the company also had a duty to expeditiously bargain, as contained in section 15 of the Act, and the company's hands were far from clean. Insofar as the wishes of the employees were concerned, the union suggested this issue was a "red herring". No statement of desire had been filed in a timely fashion, indicating opposition to continued representation by the respondent, and neither had a termination application been filed pursuant to section 57 of the Act during the open period for filing such applications. Counsel noted there was no evidence of any prejudice to the applicant throughout the period, nor any demonstration of prejudice to employees. Finally, counsel submitted an analogy should be drawn in the instant case to those cases where automatic renewal clauses were contained in collective agreements, where the Board has generally held a union need not actively bargain the first time an automatic renewal clause is relied upon. Analogously, suggested counsel, the freeze provisions pursuant to section 79 of the Act had in effect automatically renewed the agreement throughout the twelve months period and therefore the respondent ought to be given the same period of grace that respondents in automatic renewal cases have been given by the Board. Accordingly, respondent suggested that the application ought to be dismissed. In support of these submissions, counsel referred to the following cases: *Sheet Metal Workers International Association Local 397*, [1968] OLRB Rep. Oct. 731; *Interchem Prestsite Limited*, [1969] OLRB Rep. April 98; *Dominion Stores Limited*, 56 CLLC ¶18,047; *Armco Canada Ltd.*, [1970] OLRB Rep. June 334; *Medi-Park Lodges Inc.* [1979] OLRB Rep. Oct. 1007; *Yarntex Perk, Division of Yarntex Corporation Limited*, [1975] OLRB Rep. Feb. 137; *Kingston Terminal Restaurant Ltd.* 60 CLLC ¶16,163; *Pinkerton's of Canada Limited*, [1986] OLRB Rep. June 818; *Queen's Hotel*, [1963] OLRB Rep. Dec. 519; *Canadian Transportation Workers Union, No. 197*, [1967] OLRB Rep. May 154; and *Barrie Tanning, Limited*, [1966] OLRB Rep. May 128.

12. Section 59 of the Act reads as follows:

(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the

bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

13. In *Dominion Stores Limited*, *supra*, the Board noted as follows:

"The purpose of section 43 of the Act is to protect the employees and, in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section 43 should not be used to penalize a union which has failed to give notice under section 10 of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously. If a reasonable doubt arises as to the desires of the employees at that stage, the Board may test those desires by directing a representation vote."

- And in *Medi-Park Lodges Inc.*, *supra*, the Board said:

"Certification gives a union an effective monopoly in the representation of a group of employees. Section 51 of the Act is therefore intended to insure that the rights of representation extended through a Board certificate are actively advanced by the union charged with that responsibility. While nothing in the Act can insure that the granting of bargaining rights will result in the consummation of a collective agreement, section 51 acts as a spur to require immediate and continuous efforts in bargaining on behalf of the employees concerned. A union that does not meet the minimum requirements of the section is liable, upon a successful application, to have its bargaining rights reviewed through the test of a representation vote, or to have them directly terminated.

The termination of bargaining rights under section 51 is within the discretion of the Board. The purpose of the section is not to punish a union but to protect employees and employers from the hardship that can result when bargaining rights are tied up by a union that fails to discharge its responsibilities. Thus section 51 should not be applied mechanically and without regard to its purpose to insure active union representation to all employees who are subject to collective bargaining. Even where the objective conditions of section 51 are met the Board may not terminate a union's bargaining rights or order a vote when, although the union has missed the deadlines within the section, it has in fact been active in advancing the interest of the employees concerned. (*Walmer Transport Co. Ltd.* 53 CLLC ¶17,062; *Dominion Stores Ltd.* 56 CLLC ¶18,047)"

14. We do not find the analogy with automatic renewal cases to be particularly analogous or persuasive. Similarly, we find of little assistance respondent submissions that the company also had a duty to bargain and its hands are not clean in this matter. The issue before us is as stated in the excerpts from *Dominion Stores* and *Medi-Park Lodges Inc.* as set out above. While we do not adopt the language of *Dominion Stores Limited* which states that section 59 "is to be used as a shield, not as a sword", in other respects we adopt those statements.

15. More apposite than the cases referred to us by the respondent, is *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670, wherein the Board stated at paragraph 11:

"In instances where a union has not met the time requirements set out in section 59, but has either subsequently sought to bargain within some relatively short time period, or has advanced some reasonable explanation for its delay, the Board has declined to terminate its bargaining rights. See: *Walmer Transport Co. Ltd.*, 53 CLLC ¶17,062. The Board has also refused to terminate a union's bargaining rights in situations where, although a few months have passed without any bargaining, the union has, prior to the filing of the termination application, demonstrated a renewed interest in bargaining. See: *Mohawk Construction Limited* [1981] OLRB Rep. Aug. 1156. In the instant case, however, the union's delay involved more than just a few months, and the union has not advanced any justifiable reason for not seeking to engage in collective bar-

gaining. Further, there is nothing in the evidence to indicate that subsequent to November of 1979, the union has had any contact with employees in the bargaining unit. Given these circumstances, we are of the view that the employees should be given an opportunity to indicate whether or not they still desire to be represented by the union."

16. In the instant proceeding, the union has offered no valid explanation for complete inactivity during the approximately twelve month period following the giving of the notice to bargain, other than it simply forgot about the bargaining unit in question. It appears to us that the union has indeed slept on its bargaining rights, without reasonable excuse, and the employees would necessarily have been prejudiced with no bargaining occurring. Additionally, we heard evidence that employees were dissatisfied with the failure to negotiate. Whether or not the mere passage of time over such a lengthy period will necessarily demonstrate prejudice to an employer we need not decide, as we are satisfied that the employees have been prejudicially affected by this delay.

17. Accordingly, in all these circumstances we consider it appropriate that employees be given an opportunity to indicate whether or not they still desire to be represented by the respondent union. The Board directs that a representation vote be taken among the employees in the bargaining unit of the applicant. Those eligible to vote are all employees of the respondent save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards, and office janitors, on March 11, 1987 who do not voluntarily terminate their employment or who are not discharged for cause between that date and the date the vote is taken.

18. Voters will be asked to indicate whether or not they wish to be represented by the respondent union in their employment relations with the applicant.

19. The matter is referred to the Registrar.

0717-86-M International Association of Bridge, Structural and Ornamental Iron Workers, Applicant v. The Electrical Power Systems Construction Association and Ontario Hydro, Respondents

Construction Industry Grievance - Union alleging employer breached successive collective agreements by failing to remit correct amounts of benefit contributions and union dues - Union requesting that remedy cover all breaches since 1978 - Board analyzing its remedial jurisdiction with respect to prior agreements and the effect of contractual time limits for the delivery of a grievance - Remedy extended to breaches of current agreement and most recently expired collective agreement

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *I. M. Stamp* and *D. Patterson*.

APPEARANCES: *L. Steinberg* and *J. Phair* for the applicant; *D.K. Gray* and *I. Starasts* for the respondents.

DECISION OF THE BOARD; April 6, 1987

1. Since May 1, 1978, the International Association of Bridge, Structural and Ornamental Iron Workers ("the union") and the Electrical Power Systems Construction Association ("EPS-CA") have been parties to a succession of two year collective agreements covering the employment of iron workers by members of EPSCA in the electrical power systems sector of the construction

industry. On June 6, 1986, the union grieved that Ontario Hydro ("Hydro"), a member of EPSCA bound by each of the agreements, had since May 1, 1978 breached each of those agreements by failing to make direct payment of the correct amounts of pension, welfare and Ironworker Trade Improvement Plan ("TIP") contributions on behalf of those of its iron worker employees who were entitled to a "shift differential" with respect to their work on the second shift of two shift operations. That grievance has been referred to this Board for arbitration pursuant to section 124 of the *Labour Relations Act* ("the Act"). By agreement of the parties, the issues we are to arbitrate also include the alleged failure of Hydro during the same period to deduct the correct amount of union dues from the earnings of ironworkers doing second shift work.

2. The issue is quite simple. In addition to payment of base rate wages to a covered employee, the relevant collective agreement provisions require each bound employer to make welfare, pension and TIP contributions on that employee's behalf directly to the relevant fund or trust. The amount of each contribution is a specified dollar and cent amount "per hour paid." Each employer must also deduct union dues from the wage payments it makes to each such employee and remit those dues to the appropriate local union. The dues deductions are also a specified number of cents "per hour paid." By contrast, at least one other provision of the collective agreements requires the payment of an amount "per hour worked." The collective agreements all contain the following provision for shift differential:

SHIFT DIFFERENTIAL

Employees required to work shift work on the second shift of a two (2) shift operation shall receive a shift differential of time and one-seventh for normal scheduled shift hours worked.

Hydro has been paying workers one-seventh of their base rate wage in addition to their straight time wages for hours worked on scheduled second shifts. In calculating welfare, pension and TIP contributions (hereafter collectively referred to as "'per hour paid' benefits") and union dues deductions, however, Hydro has treated each hour worked on a scheduled second shift as one "hour paid." It has not applied the shift differential in calculating the amounts of "per hour paid" benefits or union dues deductions. The union says the intent and effect of the shift differential provision was and is that workers on a scheduled second shift should receive eight hours' compensation for every seven hours worked, so that all elements of compensation payable "per hour paid" should have the shift differential applied to them. The issue, then, is whether the "time and one-seventh" shift differential applies only to the base rate wages paid directly to the employee or also to those deductions and other items of compensation which are to be calculated on a "per hour paid" basis.

3. The June 6th grievance was filed after the parties' May 1, 1984 to April 30, 1986 collective agreement had expired. The parties have since concluded a further collective agreement with effect from May 1, 1986. The language of that agreement is, they tell us, identical to that of the previous agreement in all respects material to the issues at hand. The parties agree that we should determine those issues under both the most recently expired collective agreement and the current collective agreement. The union asks that we also deal with the alleged violation of all previous agreements, while Hydro takes the position that we have no jurisdiction to arbitrate a grievance with respect to the alleged violation of any agreement prior to the most recently expired one. If we find in the union's favour with respect to the meaning of the provisions in question, the parties agree we should determine the period of time, if any, for which damages are payable and retain jurisdiction to determine the actual amount of those damages if the parties are thereafter unable to

resolve that question themselves.

The Meaning of the Provisions In Question

4. Evidence led by Hydro establishes that it has never applied the shift differential to "per hour paid" benefits or union dues deductions at any time in the period since 1978 during which it has been covered by EPSCA's agreements with the union, nor in the two prior years during which Hydro had a direct collective agreement with the union containing a similar shift differential clause. The difference between Hydro's practice and the union's view of Hydro's obligations under the succession of collective agreements in question only became apparent during the negotiation of the now current collective agreement when, in a discussion of shift differential for third shifts, a Hydro participant denied a union participant's statement that the shift differential for second shift hours was being applied by Hydro to its welfare and pension contributions. There is no evidence that either Hydro or the union was aware of the differences in their respective views before then. There is no evidence that the union knew Hydro *was not* applying the shift differential to calculation of 'per hour paid' benefits payments and union dues deductions, nor that any specific behavior of Hydro's would have led the union to believe that it *was* doing so.

5. The union officials who testified say the union never suspected there was a problem because it knew other members of EPSCA applied the shift differential in calculating "per hour paid" benefit contributions and union dues deductions, and it assumed Hydro did too. Neither Hydro nor EPSCA challenged these assertions about the practice of other EPSCA members. Counsel for EPSCA led no evidence with respect to any other EPSCA member's practice or understanding of the meaning of the collective agreement.

6. Counsel for the union sought to introduce evidence about the negotiations which led to its 1978 agreement with EPSCA. He said the evidence of the union's spokesperson in those negotiations would show that the issue now before us was discussed and resolved in the union's favour at that time. Counsel for EPSCA and Hydro objected, chiefly because the evidence was unexpected and there was a concern that the corresponding EPSCA spokesperson might be unavailable. We ruled that we would hear the union's evidence and make whatever accommodations of the respondents might be required by way of adjournment. As matters developed, the respondents were able to address the subject of the negotiations for the 1978 agreement through the evidence of Hydro's current Director of Staff Relations, who had been a Senior Construction Labour Relations Officer for Hydro and Secretary Treasurer of EPSCA at the time.

7. The evidence of the applicant and the respondents established that the notion of giving second shift workers eight hours' pay for seven hours' work predated the union's negotiations with EPSCA and originated in its agreements with Ontario Erectors Association ("the OEA"), under which workers on a second shift worked seven hours per shift but were paid as though they had worked 8 hours at straight time. The shift differential article took on its present form in the union's earlier agreement with Hydro because Hydro wanted eight hours' work performed on each second shift, not seven. The resulting language carried over into the first and subsequent EPSCA agreements. The union's negotiations with EPSCA began after OEA members working in the electrical power systems sector joined EPSCA. Each party's witness to the first EPSCA/Ironworker negotiations agreed there was general discussion about the union's wish to have practices in its agreements with the OEA carry over into the agreement with EPSCA. The union's witness testified without contradiction that the practice at the time was that OEA members applied both the shift differential and the overtime rate to calculation of "per hour paid" benefits. There is no evidence that the existing OEA practice with respect to the shift differential was expressly mentioned during negotiations. Hydro's witness acknowledged that the application of the overtime rate to "per hour paid"

benefits was specifically discussed, and that he understood this would be done under the agreement EPSCA made with the union, in conformity with the practice under the union's agreement with the OEA. The overtime provision in the resulting collective agreement, and in each collective agreement thereafter, reads, in part, as follows:

OVERTIME RATES

Overtime shall be paid at two (2) times the basic rate for all work performed outside of normal hours ...

Hydro's witness does not remember specifically discussing application of the shift differential to benefits. He states he would remember if it had been discussed. The union's witness says the union assumed that the overtime and shift premiums would be treated the same. That is not inconsistent with the fact, as we find, that the application of the shift differential to calculation of benefits was not specifically discussed during those negotiations. Indeed, there is no evidence it was specifically discussed at any time before the occasion identified in paragraph 4 of this decision.

8. Counsel for Hydro concedes that effect must be given to the distinction in the collective agreement language between "hours worked" and "hours paid", which implied contemplates that there can be "hours paid" which are not "hours worked." He would have us read "hours paid" as "hours paid for", a method of interpretation adopted in *Re Leisure World Nursing Homes Ltd.* (1983), 12 L.A.C. (3d) 345 (Langille). He would have us conclude that the shift differential article establishes only a premium base wage rate for second shift hours and that the only "hours paid for" at this rate are the hours actually worked.

9. The collective agreement in question in *Re Leisure World Nursing Homes Ltd.*, *supra*, provided that part-time employees of the employer nursing home were entitled to 40 cents "per hour paid in addition to their regular hourly rate" in lieu of benefits of the sort received by full-time employees. The grievor was a part-time employee who had been required to work an eight hour shift on a statutory holiday and "otherwise met the qualifications for holiday pay as set out in the agreement." The award noted the parties' agreement that the grievor was entitled to the holiday pay which would have been payable had the employee *not* worked on the holiday, plus payment "at a premium rate" for actually working on the holiday. The award describes the premium rate as "one and a half times the regular rate." The union argued this meant the grievor should be paid as though she had worked 12 hours. The employer argued that an employee who is required to work eight hours on a statutory holiday "is still being paid for only eight hours, but merely at a premium rate of one and a half times the regular rate."

At page 348 of the report of the award, the arbitration board concluded that:

...The key words here, in our view, are *per hours* [sic] *paid*. Thus, for example, an employee who does not work on a statutory holiday, but who qualifies for eight hours' holiday pay, is entitled to be *paid for eight hours* and is in fact paid on that basis. Thus, the employee is entitled to 40¢ for each of these eight hours paid, but not worked. Second, an employee who works the statutory holiday is entitled to be paid for eight hours for not working, and also to be paid for eight hours worked. The eight hours worked are paid for at a premium rate, but there are still only eight hours paid for, and thus, the additional entitlement under art. 7.01 is 8 x 40¢. While the employee might receive *the equivalent* of 12 hours' pay, the employee *is paid for* eight hours (at a premium rate).

The language of the provision by which employees were entitled to "a premium rate" for the hours actually worked on a holiday is not reproduced in the award. If the provision was as the award says -- that workers would be paid a premium of "one and a half times *the regular rate*" (emphasis added) -- we would have thought the same result could have been arrived at more simply. As the col-

lective agreement described the 40 cents "per hour paid" as something to which an employee was entitled to "in addition to their regular hourly rate" and the premium payable was "one and a half times *the regular rate*", the premium would not apply to the 40 cents payment because it was something "in addition to", and therefore distinct from, "the regular [hourly] rate."

10. While it led to a defensible result in *Re Leisure World Nursing Homes Ltd.*, *supra*, we do not find the substitution of "hours paid for" for "hours paid" particularly helpful in determining the question before us. From an economic point of view, every amount paid by an employer to or for the benefit of an employee is somehow referable to the fact that the employee actually works or has worked for the employer. From that perspective, the only hours paid for are hours worked, and the careful distinction in the collective agreement between "hours paid" and "hours worked" becomes meaningless if the words "hours paid" are taken to mean "hours paid for". Moreover, the exercise of identifying the hours paid for will not necessarily be determinative of *how* those hours are to be paid for. Some hours worked attract more compensation than others. It may be that such hours of work are to be paid for by crediting the employee for compensation purposes both with the hours actually worked and with hours not actually worked. It may be that such hours of work are to be paid for by paying a premium or multiple of the compensation payable for other hours. A distinction between extra compensation in the form of a "premium rate" and extra compensation in the form of a credit of hours not worked but to be paid for is significant only if the premium rate is applied just to the base rate wage portion of the total "per hour paid" compensation package. Whether that is so must depend on the language used to describe the premium, and that brings us back to the language by which these parties have agreed that their respective members' rights and obligations would be determined.

11. In their collective agreements, the parties describe the shift differential in question here as "time and one-seventh." The extra compensation for working hours on a second shift is expressed in terms of time, not as a special wage rate and certainly not as a rate applicable only to a portion of the total wage package. Having regard to the language used to describe it, we conclude that the "time and one-seventh" premium must apply to all amounts calculable on a "per hour paid" basis, not just to the "base rate" wage portion of the compensation package.

12. We are reinforced in this view by a combination of several contextual factors. There is the historic origin of the shift differential article in the requirement under other contracts (with contractors who are now members of EPSCA) of eight hours' pay for seven hours' work. There are the content and structure of the "wage schedules" to and other provisions of the collective agreements, which implicitly treat the base rate and the "per hour paid" benefits as elements of one total "wage" package. Indeed, such treatment is explicit in Article 16.5 (first introduced in the 1984-86 agreement), by which the parties agree that employers will implement any changes in welfare or pension plan contribution amounts of which the union gives EPSCA notice, subject to the proviso that "... Should the welfare or pension plan contributions change during the term of this Agreement then an adjustment shall be made to the base rate. The total wage package will not be changed." Finally, there is the answer the parties came to when the applicability of the overtime premium to calculation of "per hour paid" benefits was explicitly discussed in 1978: the words "Overtime shall be paid at two (2) times *the basic rate* for all work performed outside of normal hours" (emphasis added) were then understood to mean and thereafter treated as meaning that workers would receive double the base rate wage *and* double the "per hour paid" benefits for each hour worked on overtime. In other words, "per hour paid" benefits were part of the "basic rate" to which the overtime premium applied.

13. Having concluded that the union's interpretation is the correct one, we turn to the ques-

tion of remedy. The union asks that the remedy cover all breaches since May 1978. Hydro argues that the remedy should be prospective only.

Remedial Jurisdiction with Respect to Prior Agreements

14. Hydro argues that we have no jurisdiction to remedy a breach of any collective agreement prior to the one which had just expired when this grievance was referred to us, relying on the award of a board of arbitration in *Re Goodyear Canada Inc.* (1980), 28 L.A.C. (2d) 196 (M.G. Picher). That award accepted the correctness of this Board's conclusion in *Genstar Chemical Limited*, [1978] OLRB Rep. Sept. 835 (at paragraph 8) that:

While the time of filing is a factor which may be taken into account by a board of arbitration - in deciding whether to arbitrate a grievance which is not filed within the time limits specified in the grievance procedure - it cannot preclude the establishment of an arbitration board to deal with a grievance arising during the term of a collective agreement.

The award went on to hold that a board of arbitration can have no jurisdiction beyond the collective agreement under which it is constituted; accordingly, a board constituted under a particular collective agreement to deal with an alleged continuing breach of identical provisions of that and earlier collective agreements could only grant a remedy with respect to the period of the collective agreement under which it had been appointed. The award also noted, however, that an arbitration board would have jurisdiction with respect to the earlier collective agreements if it were also appointed under or in respect of those agreements by the parties or by the Minister of Labour under what is now section 44 of the Act.

15. We do not derive our jurisdiction from an appointment, either by the parties or by the Minister. Our jurisdiction comes from section 124 of the Act, subsection (3) of which gives this Board "exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it" under subsection (1), which provides:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

A grievance referred to the Board under section 124 may relate to the alleged violation of a collective agreement which has expired by the time the referral is made: *Misco Insulation Company Limited*, [1982] OLRB Rep. Sept. 1343. This Board does not require that there be a separate grievance and referral with respect to each of several distinct breaches of one agreement, nor does it require that separate grievances and referrals be filed with respect to the different collective agreements under which a continuing breach has allegedly occurred. The grievance before us adequately identifies the collective agreements under which the union alleges a breach and requests a remedy. Subject to any limitation which the collective agreements themselves may impose (and to the provisions of the *Limitations Act*, if applicable), we are satisfied we have jurisdiction to entertain the grievance with respect to the entire period to which it relates under all of the collective agreements to which it refers: see *Sinclair Welding Limited*, [1981] OLRB Rep. March 343. (For a similar conclusion with respect to another statutory grievance arbitration tribunal see *Re Ontario Public Service Employees Union and The Queen et al.* (1985) 51 O.R. (2d) 474, 20 D.L.R. (4th) 281 (Ont. Div. Ct.).)

Effect of Contractual Time Limit for Delivery of Grievance

16. Counsel for the respondent also argues that the collective agreements themselves restrict our remedial authority, having regard to the emphasized portions of the following extracts from "Grievance Procedure" article of the 1984-86 agreement:

34.1 Grievances within the meaning of the grievance and arbitration procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of this Agreement.... In the interests of expediting the procedures, the parties shall process grievances in the following manner:

34.2 PRELIMINARY DISCUSSION

Disputes arising out of the interpretation or alleged violation of this Agreement shall, if possible, be settled by discussion between the employee and/or his steward and the employee's supervisor.

34.3 FIRST STEP

If a dispute cannot be resolved by this method, the Accredited Union Representative for the Union may file a formal grievance on the prescribed form with the Manager of Construction or the Manager of Lines and Stations Construction. *Such grievance shall be filed within fifteen (15) working days of the alleged grievous act.*

...

34.6 TIME LIMITS

The time limits as to both documents and procedure set out in the above Sections shall be complied with by the parties to this Agreement provided, however, that the parties may mutually agree in writing in respect to an extension or waiver of any of the time limits imposed. Where no answer is given within the time limits specified in the grievance procedure, the employee concerned, the Union or EPSCA shall be entitled to submit the grievance to the next step of the grievance procedure. *Any grievance not processed within the time limits specified in the grievance procedure shall be deemed to have been settled and ineligible for arbitration.*

[emphasis added]

Counsel for the respondents submits that unless we exercise our discretion under subsection 44(6) of the Act to extend the specified time limit, we have no jurisdiction to grant a remedy with respect to any alleged grievous act which occurred more than 15 working days before the delivery of Hydro of the written grievance now before us, citing *St. Joseph's Health Centre Toronto et al. v. Ontario Nurses Association* (Ont. Div. Ct., decision dated July 2, 1985, unreported).

17. Counsel for the union argues that the time limits specified in the grievance procedure article, including those relied upon by the respondents, are inapplicable to the proceedings before us, having regard to the opening words of subsection 124(1) and this Board's decisions in *Lummus Company of Canada Limited*, [1976] OLRB Rep. Jan. 980 and *J.H. Lock & Sons Limited*, [1986] OLRB Rep. June 731.

18. The argument dealt with in *Lummus Company of Canada Limited* was that arbitration under section 124 was an alternative to any arbitration procedure provided for (or deemed by section 44 of the Act to be provided for) in the collective agreement, and that a referral to arbitration would not be timely unless and until any pre-arbitration grievance procedure provided for in the

collective agreement had first been followed in a timely fashion and exhausted. The decision does not disclose whether the timeliness problem in the case before it had to do with failure to deliver a written grievance within a time period stipulated by the relevant collective agreement or with a failure to go through the series of meetings normally contemplated by a grievance procedure. The only reference to the parties' collective agreement appears in the second of the following two paragraphs of the decision (which confirmed an earlier ruling of December 31, 1975):

6. The Board in its decision dated December 31, 1975 indicated "that the plain intent of section 112(a) of the Act [now 124] of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure provided under the terms of the subsisting collective agreement ...". In making this ruling we were compelled by the clear and simple wording of the Legislation. Furthermore our ruling purports to reflect the underlying objective of the Legislation in providing a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. The statements and findings of "The Waisberg Report" confirm this particular perspective of the purpose of the enactment, (Volume 1 at p. 340):

"Arbitration

Both labour and management complained that current grievance and arbitration procedures are not suitable for the construction industry. There is obviously something wrong when we find that in Ontario the construction industry, which employs about 7 percent of the total work force, generates only about 1 per cent of the arbitrations. The latter figure is based on the study of arbitration awards filed with the Labour, Management Arbitration Commission of the Department of Labour, between 1 September 1971 and 1 September 1973. *The unions, apparently frustrated by the slowness and expense of the arbitration procedures, have resorted to the use of wildcat strikes and work stoppages.* Matters have now reached the stage where mere threats of such activities are sufficient. Decisions are reached on the basis of expedience."

[emphasis added]

7. We are therefore of the opinion that adoption of the respondent's interpretation of section 112(a) would operate to defeat the purpose of the Legislation. For example, the grievance procedure if pursued under the terms of the existing collective agreement between the parties could consume approximately 21 days before exhausted. (See; Articles 24.6 and 24.7). At that time, according to the respondents, the grievor, in the event the dispute is not resolved, may elect to proceed to arbitration under the terms of the collective agreement or file a reference under section 112(a). If a reference is filed the Board is obliged to hold a hearing fourteen days after receipt thereof. In other words approximately thirty-five days may elapse before the complaint giving rise to the dispute may be heard. On the other hand in adopting the applicant's approach to the Legislation, so long as the other party has received a copy of the written grievance, we are of the view that the matter may be heard and perhaps resolved within thirty-five days.

19. The following passage from the *Lummus* decision does refer in the abstract to the problem of untimely delivery of a grievance:

8. What then is the purpose of incorporating section 37(5a) [now 44(6)] as part of the plenary powers of the Board under section 112(a)(3) [now 124(3)] of the Act? In resolving this question the Board has considered with some concern the respondent's submissions with respect to unwarranted delays that may be committed by a grievor in the delivery of its grievance to the other party. The Board is satisfied that the Legislation contemplates the filing of a reference immediately after delivery of the grievance to the other party or at any stage of the grievance procedure if pursued under the terms of the agreement. We do consider it unfortunate that there is no obligation on the complainant to endeavour to effect a settlement of a dispute prior to launching formal proceedings. Nonetheless we are satisfied the Legislation anticipates that the settlement processes may voluntarily transpire thereafter for a period of fourteen days and with the aid of a Labour Relations Officer. We do not hold it consistent with the aims of the Legislation, however, that a grievor may malingering with impunity in bringing its dispute to a

resolve. In our opinion, the Board would be duty bound to require a grievor to provide a reasonable explanation for any delay in the processing of a grievance before us. In the absence of such explanation and having regard to the prejudice that may have been caused the other party to the dispute, the Board may exercise like powers in disposing of the grievance as an arbitrator under the regular provisions of the Act. What the Board considers a reasonable explanation will obviously depend on the facts and circumstances of the case. One explanation that would most likely find favour with us are delays occasioned by sincere and *bona fide* attempts to resolve the dispute prior to initiating proceedings under the Act. We anticipate that a grievor seeking relief under section 112(a) [now 124] will conduct itself with dispatch in attempting to resolve its complaint. In the event it delays in initiating a grievance or permits a time limit to expire under the grievance procedure contained in a collective agreement once pursued, the Board, in the absence of a reasonable explanation, may take appropriate measures that best suits [sic] the circumstances. This in the last analysis is how the Board conceives its powers with respect to section 37(5a) [now 44(6)] of the Act.

On a careful reading, it is not at all clear from this passage that the Board in *Lummus* thought a time limit for delivery of a written grievance (as opposed to a requirement that something be done after delivery and before a reference to arbitration) was rendered nugatory by the opening words of what is now subsection 124(1) of the Act. It is hard to understand why the panel would ultimately have answered its own concern about delays in delivery of a written grievance with a reference to its powers under what is now subsection 44(6) of the Act if it thought the opening words of subsection 124(1) eliminated any contractual time limit for the delivery of a written grievance on which powers under subsection 44(6) could be brought to bear.

20. In *J. H. Lock & Sons Limited, supra*, the Board did have before it a preliminary argument that the grievance referred to it under section 124 was not arbitrable because the grievor had not informed the employer and the union "within 5 days of the violation" as required by the collective agreement. The panel there said:

[W]e note that in *Lummus Company Canada Limited* and *The Ontario Erectors Association*, [1976] OLRB Rep. Jan. 980, the Board held that section 124 permits the applicant to refer a grievance to the Board regardless of any provisions in the collective agreement: "the plain intent of section [124] of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure provided under the terms of the subsisting collective agreement" On this view, section 44(6) of the Act, which permits the Board to "extend the time for the taking of any step in the grievance procedure under a collective agreement" if it is satisfied that "there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension", and which is incorporated into section 124 of the Act, relates to the timeliness of the filing of a reference after delivery to the other party 'or at any stage of the grievance procedure if pursued under the terms of the agreement'. Here the union has chosen the alternate statutory route and there has been no delay between delivery to the respondent and filing of the grievance. This approach to the effect of section 124 was approved by the Ontario Divisional Court in *The Ontario Erectors Association and Sheaffer-Townsend Limited v. International Union of Operating Engineers*, Local 793, (unreported), dated February 19, 1980. However, even if section 44(6) were intended to refer only to the terms of the collective agreement and the applicant is required to conform to those terms (that is that section 124 provides a supplementary, not alternative, method of grievance resolution), upon consideration of all the material before us, including submissions of the parties, and in particular taking into account the nature of the case, we are satisfied that there are reasonable grounds for extending the time period in section 27:01 of the collective agreement and that this is a proper case for so doing. In any case, since in our view the timing of the violation, if a violation has occurred, is best determined on the evidence adduced on the merits of the case, since the applicant's theory of the case is that Sumka has been subject to dismissal by not being recalled as he had previously been according to the employer's past practice, we would be most reluctant to dismiss the case on preliminary objection on the basis of delay. For all the above reasons, we are not prepared to dismiss the matter at this stage of the proceedings.

It appears that the panel's reference to the effect of section 124 on a contractual time limit for

delivery of a grievance was *obiter dicta*, since it notes that it would not give effect to the employer's timeliness argument as a preliminary matter because the time at which the alleged violation had occurred (and, hence, the factual premise of the preliminary objection) was a matter of then unresolved dispute.

21. The timeliness issue dealt with by the Board in the decision under review by the Ontario Divisional Court in *The Ontario Erectors Association and Sheaffer-Townsend Limited v. International Union of Operating Engineers, Local 793* (1980), 2 A.C.W.S. (2d) 307, concerned an alleged failure of the grievor union to comply with a collective agreement requirement that there be a second step meeting of representatives of the union and the employer to discuss a grievance before the grievance could be referred to arbitration. It was in that context that Mr. Justice Osler said this:

A preliminary point was raised before the Board as to whether it had to consider the stage to which the grievance procedure had reached, and the fact that the procedure within the agreement itself had not been concluded. The Board dealt with this point in paragraph 4 of its reasons in the following succinct paragraph:

"In the *Lummus* case the Board held that the effect of section 112a of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure set out in a collective agreement. In reaching this decision the Board stated that it was compelled to the result by the "clear and simple wording of the legislation." The Board also noted that its decision reflected the underlying objective of the legislation of providing for a speedy process by which to resolve disputes arising out of the interpretation of the collective agreements negotiated in the construction industry. With respect to the instant case, we similarly find that even if the applicant did fail to follow the grievance procedure set out in the collective agreement, that fact of itself would not be fatal to this referral. Before leaving this point, it should be noted that the representative of the applicant at the hearing disputed the contention that the grievance procedure set forth in the collective agreement had not been adhered to."

The reference to the *Lummus* case is a reference to an earlier decision of the Board, cited as (1976) O.L.R.B. Reports, January, 1980. We find nothing that can be objected to in that paragraph. It was a decision the Board was authorized to make. It reflects a common sense interpretation of the words of section 112a and if it were for us to decide we would agree with that interpretation. It was, however, one for the Board and one with which we cannot interfere.

The Court's approval was of the reasoning in the paragraph it quoted in the context of issues raised in the case then at hand. The Court's decision does not address the proposition that section 124 relieves a grievor from agreed upon consequences of failure to comply with a contractual time limit for delivery of a written grievance.

22. Having regard to the expedition which section 124 was intended to impose on the grievance and arbitration processes in the construction industry *and* on the parties to those processes, we are satisfied that the analysis in paragraphs 6 and 7 of the *Lummus* decision fully support the proposition that the opening words of subsection 124(1) relieve the referring party from compliance with any collective agreement requirement that steps be taken after the delivery of the written grievance before there can be a referral to arbitration. We are not satisfied, however, that either the need for expedition or the analysis in paragraphs 6 and 7 of *Lummus* support the proposition that the opening words of subsection 124(1) should be taken to relieve the referring party from the consequences of non-compliance with an agreed time limit for the delivery of a written grievance. There is no inconsistency between a collective agreement's requirement that a written grievance be delivered before its subject matter can be referred to arbitration and the express requirement of subsection 124(2) to the very same effect. There is no inconsistency between the concern for expe-

dition reflected in section 124 and the enforcement of the parties' own standards for expedition in delivering a written grievance. We conclude that the opening words of subsection 124(1) do not render a contractual time limit for the initial delivery of a grievance nugatory when the grievance is referred to this Board for arbitration under section 124. If the decision in *Lummus* holds otherwise, we respectfully decline to follow it.

23. The grievance with which we are concerned here involved the repetitive commission of particular breaches of the subject collective agreements. This is often described as a "continuing breach." It is well established that a party's failure to grieve earlier instances of a "continuing breach" by the other within the time limit specified by their collective agreement will not itself render later repetitions inarbitrable. If the time limit is "mandatory", however, only those repetitions which occurred within the specified time prior to filing of the grievance can be the subject of redress: see *Goodyear Canada Inc.*, *supra*, at p. 203. By virtue of subsections 124(3) and 44(6) of the Act, this Board has the power to extend the time limit in Article 34.3 and its predecessors, unless the collective agreements in question expressly state that subsection 44(6) does not apply. None of them does.

Extension of Time Limit Under Subsection 44(6)

24. Counsel for the union argues that if the collective agreement time limits would otherwise limit our remedial jurisdiction, as we have concluded they would, we should exercise our power under subsection 44(6) and extend the time limit because the union did not know of the "grievous acts" until shortly before the grievance was filed. It asks that we so extend the time limit in each of the agreements with respect to each of the breaches thereunder as to permit full recovery of all underpayments since May 1, 1978.

25. Counsel for the respondents argues that it is inconceivable that the union did not know how Hydro was calculating "per hour paid" benefit contributions and union dues deductions. He invites us to conclude that the union did know or was "wilfully blind", to deny any extension of time limits and to hold that the union is now estopped from asserting this claim.

26. Consideration of the argument that the union must have known or was wilfully blind must focus on the documentation generated by Hydro when it made its payments. Hydro's payments to workers covered by the relevant agreements are accompanied by a statement in the form of a pay stub. Pay stubs currently in use by Hydro have on them an area marked "Paid Hours." A second shift worker who works 38 hours (a standard work week) will find 38 hours in the "Paid Hours" area (just as a first shift worker would) plus an entry in another area of the stub reflecting the extra wage paid to the worker for second shift work. By way of contrast, any worker who works overtime would find an amount equal to his regular hours plus two times his overtime hours in the "Paid Hours" area of his pay stub. A worker's pay stub does not show the number of second shift hours worked in the pay period (although this could be calculated from the separate shift differential payment), nor does it show the amounts of Hydro's direct contribution payments on the worker's behalf to the Ironworkers Central Welfare fund, the Ironworkers Ontario Pension Fund and the Ironworkers Trade Improvement Plan. It does show the amount deducted for dues remitted to the relevant local union. A second shift worker aware of the union's position that the shift premium is to be applied to union dues deductions could have ascertained, by using a calculator and referring to the collective agreement, that the union dues deduction shown on his pay stub was less than expected by an amount which might be as much as one-fifth of one percent of his gross pay. There is no evidence that any worker ever performed this analysis. We think it very unlikely that any rank and file worker or shop steward ever did perform such a calculation. The argument that the union was on notice because on each second shift there would have been a shop steward

who received such pay stubs does not persuade us that the union either knew or was wilfully blind to the fact that Hydro was not applying the shift differential to its calculation of union dues deductions.

27. Hydro's payments to the Ironworkers Central Welfare Fund, the Ironworkers Ontario Pension Fund, the Ironworkers Trade Improvement Plan and the local unions are each accompanied by documentation which identifies the workers on whose behalf payments are being made and the amounts of those payments. Dues documentation lists worker names and dues amounts, but does not show how the dues were calculated. Documentation accompanying welfare and pension contributions shows numbers of "Worked Hours" and "Paid Hours" and a dollar amount opposite each worker's name, but does not indicate how "Paid Hours" were calculated. None of the documentation supplied by Hydro with any of its payments shows which workers (if any) were entitled to a shift differential (or an overtime rate) at any time during the period covered by the accompanying payment. Neither the worker nor any one of the recipients of "per hours paid" benefit payments made on the worker's behalf could know from application of his personal knowledge to the documentation he received from Hydro whether a shift differential has been applied by Hydro in calculating those payments. The local union would not have known from the documentation it received from Hydro whether the amounts of dues remitted to it had been calculated in accordance with its understanding of the effect of the shift differential article.

28. The collective agreement speaks to the information which an employer must include in a statement accompanying each payment of wages to employees covered by the agreement. The relevant provision does not require that the statement show the amounts of "per hour paid" benefit contributions made on the employee's behalf. The collective agreement does not expressly require that any information accompany "per hour paid" benefit or union dues payments. By way of contrast, the provision requiring member employers to make contributions to the Electrical Power Systems Construction Association Fund expressly stipulates that those remittances are to be "in accordance with the standard form of remittance supplied by EPSCA." There is no suggestion that the information which accompanied Hydro's "per hour paid" benefit and union dues payments in any way failed to satisfy any express or implied requirement of any of the collective agreements, nor that Hydro has ever been asked for and refused to supply any additional information about those payments. We have no reason to suppose that a request for such information would not have been promptly honoured by Hydro.

29. A local union could have discovered the discrepancy with respect to dues deductions if it had gathered up pay stubs from a sample of members, including second shift workers, made its own calculations of the dues which ought to have deducted with respect to those workers having regard to the number of regular, second shift and overtime hours indicated by the stubs and compared the results of its calculation with Hydro's figures. If the various plan administrators had done something similar, they too could have detected the discrepancy with respect to the payments to them on behalf of workers entitled to the second shift differential. There is no evidence that anyone ever performed or attempted to perform an audit of this sort. There is no evidence that Hydro ever reviewed its payroll practices with the union or that the union ever requested such a review. There is no evidence that the union ever asked Hydro how it calculated "per hour paid" benefit contributions or union dues deductions for second shift workers at any time before the discussion mentioned in paragraph 4 above.

30. We do not conclude that the union knew how Hydro was making its calculations. While it seems to have been indifferent both to the possibility that Hydro did not share its interpretation of the collective agreements and to the possibility that Hydro was miscalculating the amounts it was required to pay, we cannot say the union hid from facts which would or should have made it

aware of the situation. We would not describe the union as having been "wilfully blind." Whether or not "wilful blindness" or even actual knowledge would be sufficient, without more, to give rise to an estoppel, the doctrine of estoppel on which the respondents sought to rely does not bear application in these circumstances.

31. Counsel for the respondents argued that we ought to deny any remedy with respect to past breaches because of the union's delays in grieving them even if the union did not know of the breaches. In that regard, he relied on the following extracts from the award of Professor Laskin (as he then was) in *Re Canadian General Electric Co.* (1952), 3 L.A.C. 980 at pp. 982-983:

...Is there, then, any basis on which a grievance can justly be declared "stale" or "out of time", and thus subject to rejection without consideration of its merits? And if there is such a basis of rejection, is this case within its limits? In considering the problem it is safe to start with the proposition abstract though it may be, that grievance about an alleged violation of a Collective Agreement should be brought within a reasonable time after the alleged violation has occurred. It should make no difference to the application of this proposition that the grievors were unaware that they had a right to complain, unless they were in some way misled by the Company. A Collective Agreement is binding on the Union and employees as well as on the employer, and it is a chief function of a Union as a Collective Bargaining Agent for employees to be zealous in asserting rights of employees under a Collective Agreement. Absent bad faith on the part of the employer, a Union which misconceived its rights or those of employees and thereby fails to press them, should not be permitted to make a retroactive claim to re-open, after the lapse of a reasonable time, transaction which have been completed, as, for example, cases of piece-work jobs for which payment has been made and accepted without expression of dissatisfaction.

...The efficient and expeditious conduct of labour relations or, what is much the same thing, the proper administration of a Collective Agreement, requires mutual recognition by the parties of a principle of repose as to all claims under the Agreement not asserted within a reasonable time and involving matters which have, to all outward appearances, been satisfactorily settled between the parties. Unless some such policy is admitted, then, having regard to continuing nature of Collective Agreements there is wide scope for harassing activities by each party with consequent danger of damage to represent relations by dragging up ghosts from the past.

It is apparent from the context in which these remarks were made that the unawareness referred to in the first paragraph of these extracts was not unawareness of the facts which constituted the alleged breach of a collective agreement but, rather, unawareness of a right to complain about facts which were known to the grievors. Concerns of the sort expressed in these extracts are concerns which have been met by the adaptation to grievance arbitration of the equitable doctrine of *laches*. While it may be debated whether it is necessary for the application of that doctrine to find that the grievors have been aware for some time of their right to complain and not just of the facts on which a complaint could be made (compare *Re Parking Authority of Toronto* (1974), 5 L.A.C. (2d) 150 (Adell) at p. 158), there can be no question that the grievors must at least be fixed with knowledge of the facts themselves before the conventional doctrine of *laches* can apply: *Re International Nickel Company of Canada*, L.A.N. September, 1975 (Simmons). It does not appear to us that the doctrine of *laches* can apply to the case before us.

32. The issue at hand is whether and to what extent we should exercise our power under section 44(6) to extend the collective agreement time limit for delivery of a written grievance with respect to some or all of the breaches which occurred more than 15 working days prior to the actual filing of the grievance now before us or, to put it another way, to determine the period prior to that filing in respect of which a remedy will be granted. Counsel referred in argument to several awards dealing with the exercise of discretion under subsection 44(6). None involved a failure to meet a collective agreement time limit by a grievor who did not know about the subject matter of the grievance within the time limit. None dealt with the extension of a collective agreement time limit beyond the term of the collective agreement under which the act omission complained of was

alleged to have occurred. (This question could have been but was not raised by the parties in *Sinclair Welding Limited*, [1981] OLRB Rep. Dec. 1822). Certainly, none of the awards dealt with a proposed extension under subsection 44(6) which was greater in length than the full term of a collective agreement.

33. We note that the grievance procedure provisions we have quoted in paragraph 16 seem premised on an assumption that a “grievous act” can become the subject of a “dispute” immediately upon its occurring. That will be true of the sorts of things one ordinarily thinks of as becoming the subject of a grievance. It will not be so, however, if the occurrence of the grievous act is something about which the injured party does not learn, and could not reasonably be expected to learn, when it occurs or within a relatively short time thereafter. If a grievor did not know and could not reasonably be expected to have known of the grievous act within the specified time limit, that is a perfectly reasonable ground for extension of that time limit, subject only to the question whether doing so will cause substantial prejudice to the opposite party. In this case, the union’s delay in responding to Hydro’s long failure to apply the shift differential in calculating “per hour paid” benefits payments and union dues deductions resulted from the union’s lack of actual knowledge of that failure. We are satisfied that the period which a remedy ought to cover in these circumstances should extend farther back than 15 working days from the day the written grievance was delivered. The more difficult question is: how far back should the remedy reach? Is the lack of prior knowledge of the factual basis for the grievance, which obviates application of conventional doctrines of *estoppel* and *laches*, a complete answer to any proposition that the circumstances warrant a limit on the period for which recovery is permitted? We think not.

34. Bargaining for a collective agreement involves, among other things, identification of the issues of concern to each party and assessing their relative importance to that party. Some concerns are resolved or abandoned relatively quickly. Other concerns are given more attention. The exigencies of the real world force both parties to separate the wheat from the chaff. This dynamic of the bargaining process extends into the administration of the collective agreement which results from it. The grievance process is used to distinguish the important from the unimportant. Disputes about some matters are settled or abandoned early in the process; indeed, some potential disputes may be of so little concern that they do not even become the subject of a grievance. Matters of greater concern receive more attention and are more likely to become the subject of a rights dispute at arbitration if not settled. It is up to each party to determine at first instance what weight it wishes to attach to any given issue. Its perception of the other party’s view of the significance of that issue will be relevant to that determination. As a result, each party relies on the other’s statements and behaviour with respect to an issue in making its own decisions and playing its own part in the collective bargaining relationship.

35. In this collective bargaining context, there is an understandable sense of unfairness to one party if the other behaves as though something which happened at an earlier time should be treated as a matter of great concern when, by its own words and conduct at that earlier time, that party had appeared unconcerned about the matter. It is in response to that underlying labour relations rationale, and not from a desire to emulate courts and their treatment of commercial contracts, that the doctrines of *laches* and *estoppel* have been imported into the arbitration of disputes arising under collective agreements. While the conventional doctrine of *laches* may be limited in application to circumstances in which a claimant delays in asserting or pursuing a claim after learning of the circumstances which give rise to it, the underlying labour relations rationale has a greater scope. Even if a party did not know of the facts on which its claim is now based at the time they arose, and so may not be said to have behaved as though those *facts* were of no concern to it at the time, it may be unfair to permit the party to pursue that claim if, at the time those facts occurred, it acted indifferently about the *rights* on which its claim is now based.

36. The right in question here is the right to have the "time and one-seventh" second shift differential applied in calculation of "per hour paid" benefit contributions and dues deductions with respect to second shift. The union assumed that this right could be implied from the contract language to which it and EPSCA had agreed, and we have found that they were right in that assumption. Nevertheless, the union did not treat the calculation of "per hour paid" benefits or union dues deductions for second shift workers as a matter of sufficient importance to warrant discussion or clarification at the bargaining table when the subject collective agreements were negotiated or at any time during the administration of those contracts. It did not require or request that sufficient information be supplied by Hydro with its payments so that Hydro's calculations of "Paid hours" could be checked. It made no effort in over eight years to verify that Hydro's methods of calculation corresponded with its understanding of the requirements of the collective agreements. It did nothing to put Hydro on notice of its understanding of those requirements. We do not suggest that the union had a duty to Hydro to do any of those things. The union had the freedom to make its own decisions about the vigilance with which it would scrutinize employers' performance of their obligations under these agreements. Choices made in the exercise of that freedom are not without practical consequences, however. This union chose to act indifferently about the method and accuracy of Hydro's calculation of benefits and dues deductions. Had it given the matter some attention and concern, the parties' differences in interpretation would have surfaced and been adjudicated much earlier and Hydro, through EPSCA, would have had a much earlier opportunity to bargain for a different provision or otherwise take the resultantly settled meaning of these provisions into account in negotiations.

37. While it follows from our award that the collective agreement provisions in question have meant what the union thought they meant since May of 1978, and that Hydro has underpaid benefit contributions and dues deductions ever since, it would also follow from a strict application of the contract language agreed to by the union that there could be no recovery of underpayments which occurred more than 15 working days prior to the filing of the union's grievance. Our exercise of the discretion to relieve against that limitation must necessarily look beyond the words of the agreements. Are there reasonable grounds for the extension? Will the opposite party be substantially prejudiced by the extension? In the circumstances of this case, the balance between those considerations is a function of the length of the extension. We have already noted our conclusion that some extension is reasonable, having regard to the union's lack of actual knowledge of Hydro's continuing breach. In that respect, the union's was not the only indifference at work here - there was also Hydro's apparent indifference to the way these agreements were being administered by other EPSCA members. Nevertheless, an extension of over 8 years would accord the rights in question a level of concern which is seriously out of proportion to the level of concern about them which the union demonstrated during the period in which the breaches occurred.

38. Taking all these factors into account, we are of the view that the remedy in this matter should only extend to breaches of the current agreement and the most recently expired (1984-86) collective agreement. We hereby extend the time limits in those agreements to the extent necessary to give effect to that view. We direct that Hydro pay to each of the relevant funds and trusts the difference between the amount of "per hour paid" benefit contributions which have been made under those agreements to date and the amounts which ought to have been paid. With respect to union dues, Hydro shall compensate each local union for any loss it may have suffered as a result of having not collected through Hydro the full amount of dues payable through payroll deduction by ironworkers employed by Hydro from and after May 1, 1984. Calculation of compensation for dues underpayments is, of course, subject to each local union's obligation to mitigate by direct collection from the workers concerned. We retain jurisdiction to determine the amounts payable if the parties are unable to agree.

2659-85-M The International Brotherhood of Electrical Workers, Local Union 1788, Applicant v. The Electrical Power Systems Construction Association and Ontario Hydro, Respondents

Construction Industry Grievance - Trade union alleging Hydro unreasonably refused to hire grievor - Hydro having general practice of advising the union and the employee when a discharged employee is not eligible to be re-hired - Grievor not advised at time of discharge that he could not be re-hired - Refusal to re-hire unreasonable - Hydro ordered to employ grievor

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *W. A. Correll* and *C. A. Ballentine*.

APPEARANCES: *A. J. Ahee* and *J. Mulhall* or the applicant; *M. Patrick Moran*, *James Ella* and *John A. Tomlinson* for the respondents.

DECISION OF THE BOARD; April 30, 1987

1. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. The applicant trade union alleges that Ontario Hydro unreasonably refused to hire the grievor, Mr. Craig Jordan, as an electrician at its Darlington generating station. The company contends that due to the grievor's previous poor employment record with it, which culminated in his dismissal, it was entitled to refuse to hire him.
2. The grievor was initially hired by Ontario Hydro as a first-year apprentice on July 4, 1978. He commenced his employment at the Pickering generating station. The grievor's supervisors viewed him as an intelligent individual with a good grasp of the relevant theory, but who failed to consistently apply himself on the job site. On February 27, 1981 the grievor was given a written warning advising him that his work performance had deteriorated to the point where he was rated below average with respect to his attitude, attendance, punctuality, cooperation with other employees, and work volume. In June 1981 the grievor resigned his position to take flying lessons in New Brunswick. An evaluation prepared on July 18, 1981, after his departure, ranked the grievor as having been "fair" in terms of aptitude, work quality and co-operation, and "poor" in terms of progress and effort. His most recent foreman commented on the evaluation form that "this apprentice has had continuing problems with attendance and effort".
3. The grievor returned to employment with Ontario Hydro in 1982. In June of that year he was transferred to London. The applicant union called as a witness Mr. Larry Cook, who had been a sub-foreman on the London job. Mr. Cook testified that the quality of the grievor's work had been very good, and rated his overall performance as average. Mr. Cook's assessment, however, was not shared by management. On October 1, 1982 the grievor received a letter complaining about a lack of effort on his part. On March 4, 1983 he was advised that he was being terminated due to his below-average work performance. As the result of a grievance challenging the discharge and related settlement discussions, the grievor's discharge was changed to a 13-day suspension. It was also agreed that the grievor would report for work in Niagara Falls.
4. The grievor reported to work in Niagara Falls on April 18, 1983. Mr. Cook, who was also a sub-foreman on this job, rated the grievor's performance as average. For its part, the company raised no complaints about the grievor's performance during this period. In December 1983 the grievor was laid off due to a lack of work. He was recalled to Ontario Hydro's Pickering generating station in December 1984.
5. The applicant called Mr. Ron Gilbert, a tradesman who had worked with the grievor

for a few months at Pickering, to testify. According to Mr. Gilbert, the grievor had been a better-than-average worker who did an average day's work. Mr. Gilbert's assessment, however, was not shared by management. On March 28, 1985 Mr. W. K. Scott, the electrical general foreman on the site, advised the grievor in writing that his work performance and attendance were unsatisfactory. Mr. Scott referred to a lack of attentiveness on the grievor's part. Subsequent to May 22, 1985 Mr. D. Atkinson was the grievor's foreman at Pickering. Mr. Atkinson testified that he found the grievor to be "very bright" but that he demonstrated a poor attitude and had low productivity caused in large measure by his frequently being away from his place of work. On July 9, 1985 the grievor was suspended for three days for not being at his proper job location. On November 11, 1985 he was discharged. We were not advised as to the specific events giving rise to the discharge, but presumably they related to management's continuing dissatisfaction with the grievor's work performance. A telegram sent to the grievor, with a copy to the union, advising him of his discharge read as follows:

"Following an investigation of events leading up to your suspension on Friday, November 8, this will advise you that you are being discharged for cause effective Monday, November 11, 1985."

6. The union grieved the discharge. Mr. J. Mulhall, the Business Manager of Local 1788, met with the company at a step one grievance meeting. Subsequently a three-person union grievance committee met to consider whether the grievance should be processed further. Mr. Mulhall explained the company's position at the step one grievance meeting to the grievance committee. The grievor then spoke on his own behalf, arguing in favour of his reinstatement. The grievance committee concluded that there were arguments in support of both the company's and the grievor's positions. The committee concluded that the union should not process the grievance any further. Instead, the committee recommended to the grievor that he write the examinations to qualify for his certificate of qualification as a journeyman, and advised him that once he had his certificate the union would refer him out to work. Local 1788 represents only employees of Ontario Hydro. Accordingly, any referral of the grievor would be to work with the respondent. The grievor acquired his certificate of qualification on January 20, 1986. Apparently he completed the requirements for the certificate sometime earlier.

7. At the time of the grievor's 1985 discharge, the company was actively engaged on construction work at its Darlington generating station. In November, 1985 Mr. James Ella, the company's personnel officer at Darlington, was advised of the grievor's discharge from Pickering. Mr. Ella was already aware of the grievor's 1983 discharge and reinstatement. Mr. Ella was concerned that the union might refer the grievor to work at Darlington. Accordingly, on November 19, 1985 Mr. Ella sat in on a meeting at Pickering where local management considered the grievance challenging the grievor's discharge. Mr. Ella, who was present only as an observer, asked if he could be given the grievor's personnel file. His request was refused since management at Pickering felt they required the file. On or shortly prior to January 13, 1986 Mr. Ella again requested the file, this time receiving it on the same day. Following a review of the file Mr. Ella concluded that the grievor was neither competent nor reliable and should not be employed at Darlington. Mr. Ella then composed a letter to the grievor which he had delivered to the Darlington employment trailer. The letter read as follows:

To Mr. Craig Jordan:

This is to advise you that Ontario Hydro refuses to employ you at its Darlington Project on the grounds that you are deemed to be neither reliable nor competent.

8. On December 5, 1985 the company filed a help requisition with the union seeking the services of 13 electricians and 7 electrician welders at Darlington. The grievor was one of the elec-

tricians selected by the union to be referred to the site. On or about January 13th, the grievor telephoned the personnel trailer at Darlington and advised an employment expeditor that he would be reporting to work the following day. On the following day, however, the grievor called in to say he would be delayed until January 15th. Mr. Ella, who happened to be in the trailer, advised the grievor that if he reported to the site he would not be hired. Notwithstanding this warning, on January 15th the grievor reported to the job site with a referral slip from the union. He was handed Mr. Ella's letter of January 13th. The grievor then filed a grievance concerning the company's refusal to hire him, and it is this grievance which is now before us.

9. The provision in the collective agreement which relates to the referral of tradesmen to a company job site provides as follows:

The employment and layoff of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:

- (i) The Employer agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. The EPSCA office will request the appropriate Local Union office for certified tradesmen and apprentices required and no one will be employed unless they are in possession of a clearance card from the Local Union office.
- (ii) If the Local Union is unable to furnish certified Local Union or travel card members to the Employer within three (3) working days of the time the Local Union office receives the request for tradesmen (excepting Saturdays, Sundays and Holidays), the Employer shall be afforded the right to employ certified tradesmen (travel card members or permit holders) as are available. The Local Union will issue clearance cards to tradesmen hired in these circumstances. All employees shall register with the EPSCA office prior to commencing work. Travel card members may be replaced by Local Union members and permit holders may be replaced by Local Union members or travel card members who maintain a regular residence in the geographic area of the project after three (3) working days' notice to the Employer, but in no case until a tradesman has worked a minimum of one week.

10. The issue of whether the company is entitled to refuse a tradesman referred by the union was discussed in *Ontario Hydro*, [1983] OLRB Rep. Jan. 99. In that case the Board concluded that the company does not have an unbridled right to reject tradesmen referred to it by the union. The company does, however, have the right to reject persons it believes to be unreliable or incompetent or otherwise unqualified provided that its decision in this regard is made reasonably, in good faith and without discrimination. The relevant portions of the Board's decision state as follows:

35. From this perspective, therefore, it is not surprising to learn that in those arbitration cases considering the refusal to hire a referral in the construction industry an unfettered employer discretion to hire has been honoured by a board of arbitration usually in the face of very specific contractual language retaining a discretion to hire or refuse to hire in the employer.

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Also of relevance in this particular case is the fact that the prior collective agreement between the parties set out above clearly acknowledged in section 10.2 the discretion in the employer to re-employ former employees and the "name hire" system then in operation was specifically embodied in a letter dated December 5th, 1972 appended to that agreement. The collective agreement between the parties that is in issue before this Board contains no such specific language and contains no clear acknowledgement of a discretion in the employer to hire or reject those certified tradesmen referred to it. Accordingly, on the working of this collective agree-

ment and construing it in light of construction industry practices, we have come to the conclusion that the employer does not have an unbridled right of rejection in dealing with certified tradesmen referred to it pursuant to section 701. It has given up the broad discretion it might otherwise have had in agreeing to this particular hiring hall provision.

36. But does this conclusion mean that the employer is obligated to hire all tradesmen referred regardless of whether or not they are in fact reliable and competent? Indeed, does this conclusion mean that the employer is obligated to re-employ a person it has previously discharged for cause? Clearly, the right of discharge or discipline specifically acknowledged in section 13 of the collective agreement would have little force or effect if the employer was obligated to rehire an employee it had previously discharged. It would therefore be reasonable to infer a right to reject a person previously dismissed by the employer. But must all other tradesmen referred be hired? What if a referred tradesman is intoxicated or from past experience believed to be unreliable or incompetent notwithstanding his certification? Were we to hold such an obligation existed, the employer would be required to employ the individual first and then immediately terminate on the basis of the documentation it had before it. Reading the collective agreement as a whole, it is our opinion that in agreeing to section 701 the parties did not intend such a result. The requirements of section 701 and the acknowledgement of the parties in section 7, paragraph C that reliable and competent union members will be referred and employed are best met by implying a right in the employer to reject persons it believes to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith and without discrimination.

11. In line with the Board's reasoning in the earlier *Ontario Hydro* case, for the union to succeed in these proceedings it must demonstrate that the company's refusal to hire the grievor at Darlington was unreasonable, arbitrary or in bad faith. The company had discharged the grievor as an unsatisfactory employee approximately two months before it refused to hire him at Darlington. There was no reason advanced to the company as to why the grievor, if hired, would likely be a better employee than previously. These considerations, standing by themselves, suggest that the company's decision not to rehire the grievor was not unreasonable, arbitrary or in bad faith. Indeed, the Board in the *Ontario Hydro* case referred to above concluded it would be reasonable to infer a management right to reject a person previously dismissed by the employer. The union, however, contends that an important additional consideration in this case is the fact that when it discharged the grievor, the company did not stipulate that he was not eligible to be re-hired. The union submits that the company's general practice is to advise the union and the employee involved when a discharged employee is not eligible to be rehired, and lacking such advice in the case of the grievor it was reasonable to believe that he could be rehired. The union further contends that had it been advised that he was not eligible to be rehired, it would likely have challenged the grievor's termination through the grievance-arbitration procedure.

12. The so-called "no-rehire policy" relied on by the union has its roots in a letter written February 5, 1979 from Mr. G. A. Pickell, at the time the company's manager of construction labour relations, to Mr. Hank Schueler, the then business manager of Local 1788. According to the testimony of Mr. Elia, Mr. Schueler had raised concerns about tradesmen waiting for considerable periods of time to be referred to jobs only to be turned down by the company, and these concerns had prompted Mr. Pickell to write his letter. The letter reads as follows:

Dear Mr. Schueler:

Sorry for the long delay in responding to your letter, however, the delay was intentional. I knew that Ontario Hydro's policy with regard to no-rehire was under review, and I felt that I should wait until that review was completed before responding.

As I indicated to you at our meeting of November 16, 1978, I agree with the position taken by Mr. O'Neill. Based on our collective agreement, I do not believe that a no-rehire letter is subject to grievance, however I also realize that such a letter has serious implications and, therefore, is of major concern to both you and your membership.

Just recently, Lines and Stations and Generation Projects collectively established the following policy regarding no-rehire letters which will eliminate most, if not all of your concerns:

1. In the case of a reduction of staff, an employee will not be given no-rehire status. If an employee is inadequate to the extent that the Employer no longer wants him on the payroll, the employee should be discharged, not laid off.
2. In the case of voluntary termination, a no-rehire should not be utilized. If an employee who voluntarily terminates his employment has been viewed as lacking in skill or having a poor attitude, etc., his weaknesses should be pointed out to him in writing at the time of his termination. He should be made aware that if he is subsequently rehired his tenure will be contingent upon an improvement in these areas.
3. A no-rehire status may be placed on a former employee in the case of discharge for cause. This status should be clearly pointed out in writing to the employee and his union representative at the time of discharge.

I suggest we allow an appropriate period of time for this policy to be tested and then review its effectiveness at a Standing Committee meeting.

There is no evidence to suggest that the policy referred to in the letter was ever reviewed at a Standing Committee meeting.

13. When giving his evidence in chief, Mr. Ella testified that the letter quoted above was related to a "name-hire" system of hiring provided for by the collective agreement in place at the time, which system is no longer in use. According to Mr. Ella, the company does not currently have a no-rehire policy at Darlington in the terms set out in Mr. Pickell's letter. Mr. Ella stated that Darlington does have a policy of not re-hiring a former employee if he is still in possession of company equipment, and that an employee terminated due to absence for three consecutive shifts might be given a no-rehire status for three months, but that no other no-rehire policy is in effect. Mr. Ella did acknowledge that there have been instances where employees not eligible for rehire have been advised that this was the case. The union filed a number of letters dated in 1983, 1984 and 1985 from the company to former employees, with copies to the union, advising them that they were not eligible to be re-hired, or not eligible to be rehired on a specific job, or for a specific period of time. It was the uncontradicted evidence of Mr. J. Mulhall, the union's business manager, that the union had received copies of many other similar letters.

14. The *Ontario Hydro* case, referred to above, involved the refusal by the company to rehire Mr. William Gilroy after he had voluntarily terminated his employment. The company had not sent Mr. Gilroy or the union a "no-rehire" letter at the time he left the company's employ, a fact the company relies on in these proceedings. In the Gilroy case, however, the company's refusal to rehire Mr. Gilroy did not arise out of his previous job performance. Rather, after he had left the company's employ, management became aware of certain alleged activities on his part which caused it to conclude that he was a security risk. The company then notified the union that if it referred Mr. Gilroy to work, he would not be hired. The facts of this case are clearly different from those relating to Mr. Gilroy, for here the company was aware of its concerns relating to the grievor at the time of his discharge.

15. The applicant issued a Summons to Witness to Mr. W. S. O'Neill, Ontario Hydro's director of staff relations. Prior to his fairly-recent promotion into this position, Mr. O'Neill had been the company's manager of construction labour relations. Rather than have Mr. O'Neill called as a witness, the parties agreed that an August 7, 1986 letter from Mr. O'Neill to counsel for the applicant could be filed in evidence. That letter reads as follows:

Dear Mr. Ahee:

No Rehire Policy - Ontario Hydro Construction

As I indicated when I talked to you last week, Ontario Hydro has a fairly long standing policy pertaining to the re-employment of terminated tradesmen. This policy is generally referred to as the "no rehire policy".

Attached is a copy of the 1979 letter to Mr. H. Schueler which sets out the policy in detail. This policy was established to provide line managers in both Lines and Stations and Generation Projects Construction with guidelines on the assignment of no rehire status. Although this was set up as a policy, it was never put in any formal policy document. However, it has not been withdrawn by Ontario Hydro.

Attached to Mr. O'Neill's letter was a copy of the February 5, 1979 letter from Mr. Pickell to Mr. Schueler the text of which is set out earlier in this decision.

16. Notwithstanding Mr. Ella's evidence to the contrary, we are satisfied that at all material times the company had a general policy of advising a discharged employee that he was not eligible to be rehired if such was the case. Mr. O'Neill's letter makes it clear that the policy was as set out in Mr. Pickell's letter to Mr. Schueler. That letter states, in part, as follows:

"A no-rehire status may be placed on a former employee in the case of discharge for cause. This status should be clearly pointed out in writing to the employee and his union representative at the time of discharge".

17. The grievor was not advised at the time he was terminated that he was not eligible to be rehired at Darlington. Contrary to the company's policy, that advice was only given to him some two months later. Because the union relied on the fact the grievor had not been accorded a no-rehire status when deciding not to refer his discharge grievance to arbitration, he was detrimentally affected by the delay. In these circumstances, the company's delay in advising the grievor that he could not be hired at Darlington, and then not hiring him was unreasonable and in breach of the collective agreement. The union contends that the Board should remedy the breach by directing that Ontario Hydro now hire the grievor with full back pay. Such a remedial order, however, would put the grievor in a better position than he would have been had he been advised that he was not eligible to be rehired at Darlington at the time he was terminated. Had he been so advised, the union would likely have taken his discharge to arbitration. Given the grievor's record, one cannot say with certainty whether or not an arbitration board would have upheld his discharge. On balance, however, we believe it likely that an arbitration board would have directed that the grievor be reinstated, but not award him any compensation. In these circumstances, as a remedy to the grievor, we direct that the company now employ him at Darlington. The company is also directed to pay the grievor the equivalent of two months pay, representing the approximate time between when, in accordance with its policy, the company should have notified him that he was not eligible to be hired at Darlington and when he actually received such notification.

18. The Board will remain seized of this matter in the event the parties are unable to agree on the amount of compensation payable to the grievor.

3096-86-R United Steelworkers of America, Applicant v. Kenoyd Limited trading as Pickering Welding & Steel Supply, Respondent

Certification - Construction Industry - Trade Union Status - Respondent an employer in the construction industry and its employees are employees in the construction industry - Whether trade union which does not pertain to construction industry may apply for certification in respect of an employer or employees that are within the construction industry - Applicant may bring application under the general provisions of the Act

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *P. Turtle*, *W. Curtis*, *R. Laird* and *T. Reid* for the applicant; *M. E. Geiger*, *Norman R. A. White*, *Jerry Randall* and *Lloyd Henning* for the respondent.

DECISION OF THE BOARD; March 31, 1987

1. The name of the respondent is amended to read: "Kenoyd Limited trading as Pickering Welding & Steel Supply".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the section of 1(1)(p) of the *Labour Relations Act*.
4. Counsel for the respondent submits that this application for certification must be dismissed on the ground that the applicant is not entitled to bring this application in view of the nature of the respondent's business and the employees that the applicant seeks to represent. Counsel for the respondent submits that the respondent operates a business in the construction industry and is therefore an "employer" as defined by section 117(c) of the Act and the employees that the applicant seeks to represent are "employees" as defined subsection 117(b).
5. The respondent is engaged in the fabrication and erection of structural steel. It also fabricates and installs other steel structures and materials such as staircases, railings and catwalks. The employees of the respondent perform both erection and installation work at construction sites and fabrication work at the respondent's premises.
6. The respondent submits bids to both the owners of the construction work and general contractors in order to obtain the fabrication, erection and installation work. It hires unskilled employees and initially trains them in its shop premises. The employees, after being trained and demonstrating sufficient progress, are assigned to work at the respondent's construction jobs under close supervision. The respondent believes that having the same employees do the erection and installation work as well as the fabrication work emphasizes the importance of the accuracy of their fabrication work in the shop. On occasion, particularly in the summer months when the respondent's volume of business is at its peak, the employees who work at a construction site for a day or part of a day will return to the respondent's shop to do fabrication work.
7. The respondent is also engaged in the supply of steel beams, reinforcing rods and other items to contractors that it does not install and will also occasionally perform non-construction work. Approximately 95 per cent of its entire business is the fabrication and installation of its production in industrial, commercial and institutional construction.

8. The Board is satisfied on the evidence that the respondent is an employer within the meaning of section 117(c) of the Act. Although not all of its business activity may be work that falls within the definition of construction industry set out in section 1(1)(f) of the Act, it is clear that a significant segment of its business is within the construction industry.

9. Furthermore, we are satisfied that the respondent's employees who perform erection and installation work at construction sites are "employees" within the meaning of section 117(b). The respondent uses the same employees to perform both shop fabrication and installation and erection work with one exception. The shop employees are trained and ultimately progress to perform field work. They may do some installation and erection at a particular project and may then work with other employees to fabricate the balance of the material for that project. In our opinion, the employees who perform the shop work for the respondent are commonly associated in their work with the on-site employees and therefore are employees within the meaning of section 117(b).

10. Counsel for the applicant conceded that the applicant is not a trade union within the meaning of section 117(f). Section 117(f) states:

"In this section and in sections 118 to 136,

...

(f) 'trade union' means a trade union that according to established trade union practice pertains to the construction industry."

11. The applicant does not, according to established trade union practice, pertain to the construction industry.

12. Counsel for the respondent submits that as the applicant is not a trade union as defined by section 117(f), it cannot apply for certification in respect of an employer or employees that come within the meaning of sections 117(b) and (c). Counsel refers to section 118 of the Act which states:

"Where there is conflict between any provision in sections 119 to 136 and any provision in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail."

Counsel then relies on section 119(1) which states:

"(1) Where a *trade union* applies for certification as bargaining agent of the *employees* of an *employer*, the Board shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it shall not confine the unit to a particular project."

[emphasis added]

Counsel submits that the words "employer" and "employees" in section 119 are defined by section 117 and therefore the Act contemplates that only a trade union within the meaning of section 117(f) can apply for certification to represent employees of an employer pursuant to section 119.

13. Counsel submits that the entire scheme of the legislation relating to the construction industry contemplates that employers and trade unions will engage in broadly based collective bargaining through the province-wide bargaining provisions or accreditation provisions in the Act.

14. Counsel refers to section 144 and argues that only trade unions as defined by section 117(f) may apply for certification in relation to the industrial, commercial and institutional sector

of the construction industry. In this case it is clear that the respondent and its employees are engaged in construction work in that sector of the construction industry and therefore, counsel submits, only a trade union within the meaning of section 117(f) can seek to represent such employees.

15. Counsel submits that the Board's approach to situations where employees are engaged in both on-site and off-site work has not taken into account the amendment to the Act in 1970 that added what is now section 117(b). He submits that the Board, by merely accepting that an application may be made under the general provisions of the Act where an employer employs both on and off-site employees, has not appreciated that both on and off-site employees can be employees in the construction industry and therefore such an application for certification may fall entirely within the construction industry provisions of the Act. Counsel submits that the pre-1970 amendment cases, such as *John Harvie Ltd.*, [1969] OLRB Rep. April 145 and *Canadian Pittsburgh Industries Limited*, [1969] OLRB Rep. April 135 have been applied by the Board in subsequent cases without considering the effect of the amendment. He referred us to *C. A. Pitts Engineering Ltd.*, [1973] OLRB Rep. Feb. 123; *Warren Bitulithic Limited*, [1981] OLRB Rep. March 376; *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197; *Ethier Sand and Gravel Limited*, [1979] OLRB Rep. Oct. 962; *Dominion Paving Limited*, [1981] OLRB Rep. Oct. 1370 and *Metro Railing Limited*, [1986] OLRB Rep. Dec. 1731.

16. Despite the ingenuity and initial attractiveness of counsel's argument, we do not accept counsel's interpretation of the Act. While section 144(1) of the Act stipulates the identity of an applicant that seeks certification in relation to the industrial, commercial and institutional sector of the construction industry, section 144(5) states:

"(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf."

17. The term "trade union" in section 144(5) is not defined by section 117(f) since section 117 opens with the words "In this section and in sections 118 to 136".

18. Additionally, the term "trade union" is not defined in section 137, the definition section relating to province wide bargaining. Therefore we are left only with the definition of trade union in section 1(1)(p) of the Act. As we found in paragraph 3 above, the applicant is a trade union as defined by that section.

19. Counsel argues that the failure to amend section 117 to include the province-wide bargaining provisions within its ambit was a mere oversight of the legislature since the province-wide provisions were added to the Act after sections 117 to 136 were part of the Act.

20. The scheme of provincial bargaining in the construction industry contemplates a broadly based bargaining structure in respect of employers whose employees are represented by trade unions that are affiliated bargaining agents of employee bargaining agencies. That scheme is supported by provisions such as section 146 that prohibit collective agreements or other arrangements affecting employees represented by affiliated bargaining agents except for a provincial agreement. Nevertheless, section 144(5) expressly provides that employees may be represented by trade unions other than affiliated bargaining agents and those unions and the employees they represent fall outside the scheme of province-wide bargaining to the extent of the bargaining rights held by those trade unions.

21. The applicant is not a trade union within the meaning of section 117(f). Therefore, it

cannot take the benefit of the construction industry provisions of the Act, and in particular, section 119. The number of employees in the bargaining unit and the description of the appropriate bargaining unit must be determined by the Board without regard to section 119, since the applicant is not a trade union as contemplated by section 119.

22. Section 119 does not stipulate that *only* trade unions within the meaning of section 117(f) may apply to represent employees of employers in the construction industry. Section 119 becomes applicable, as the opening words of that section make clear, only where a trade union within the meaning of section 117(f) applies for certification. Unlike section 144, section 119 does not provide a separate vehicle for obtaining certification in respect of construction industry employers and employees. Indeed, section 119(2), which provides:

In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made

expressly contemplates that an applicant for certification must still satisfy the requirements of section 7. Certification must still be sought pursuant to sections 5, 6 and 7. The addition of section 144 to the Act does not change the interpretation of section 119 because the definition of trade union used in that section is *not* applicable to the term "trade union" in section 144(5).

23. Nevertheless, the applicant is a trade union within the meaning of the Act and it is not an affiliated bargaining agent as that term is defined by section 137(1)(a). Nothing in section 144 or in any other section of the *Labour Relations Act* prohibits the applicant from seeking certification of construction industry employees of a construction industry employer. Since the applicant is not an affiliated bargaining agent, if it is certified it would not be precluded by section 146 from negotiating and concluding a collective agreement with respondent in respect of the industrial, commercial and institutional sector of the construction industry because the employees it would be representing would *not* be represented by an affiliated bargaining agent. The applicant is not an affiliated bargaining agent. Therefore the limitation on the (employees' right to select a bargaining agent of their own) choice that is discussed in cases such as *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195; *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575; *Ninco Construction Limited*, [1982] OLRB Rep. Nov. 1692 and *Manacon Construction* [1983] OLRB Rep. March 407; application for reconsideration dismissed, [1983] OLRB Rep. July 1104; is simply not applicable here.

24. Neither the applicant nor any of the employees for whom it will hold bargaining rights if certified will be part of the scheme of province-wide bargaining described in the Act. Any collective bargaining in which the applicant engages that might affect employees it represents who are in the construction industry and work in the industrial, commercial and institutional sector would not be subject to section 146 of the Act. Therefore, we are satisfied that the applicant may bring this application for certification under the general provision of the Act, pursuant to sections 5, 6 and 7.

25. The respondent's motion to dismiss this application is hereby dismissed.

26. This matter is referred to the Registrar to be relisted for hearing before this panel of the Board to deal with all remaining outstanding issues.

0130-85-M International Union of Operating Engineers, Local 793, Applicant v. Piggott Construction Limited, Respondent

Construction Industry Grievance - Damages - Reconsideration - Union seeking reconsideration of Board decision not to award damages for breach of collective agreement because union failed to establish that union members were available to perform the work in question - Reconsideration dismissed - Board having no evidence before it from which it could quantify the loss - Applicant not entitled to damages whether or not it had established the loss - Board having no authority to punish an employer for a breach of the collective agreement

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. Wilson* and *N. Wilson*.

DECISION OF THE BOARD; April 2, 1987

1. This is an application for reconsideration of the Board's decision in which it found that the employer had contravened the subcontracting provisions of the collective agreement but held that the union had failed to establish that it or its members had suffered any loss as a result of the contravention. Consequently, the Board held that it had no basis for awarding damages.

2. Counsel for the applicant filed lengthy submissions in support of the application for reconsideration. It is not necessary to set out these submissions in detail. The grounds for reconsideration are summarized in the applicant's submissions as follows:

The Applicant's request for reconsideration is made on two grounds. Firstly, it is submitted that the Board ignored or failed to evaluate the considerable evidence adduced by the Applicant that there were subcontractors with employees who were members of the Applicant available to perform the work described in the grievance. This constitutes a denial of natural justice to the Applicant and the commission of a jurisdictional error by the Board (See *Re OPSEU and The Queen in Right of Ontario* (1984), 45 O.R. (2d) 70 (Div. Ct.)). In the alternative, it is submitted that the Board made a fundamental error of law and policy in not awarding damages to the Applicant after it had found the Respondent had violated the collective agreement by having non-union personnel perform bargaining unit work, regardless of whether there were unemployed union members at the time the work was being performed.

3. In support of the first ground the applicant contends that it "adduced considerable evidence to prove that there were subcontractors with employees who were members of the applicant available to perform the work described in the grievance".

4. The Board's initial decision included conclusions contrary to that claim. Assuming for purposes of this request for reconsideration, that the applicant did establish that there were damages recoverable, whether by evidence that there were subcontractors in a collective bargaining relationship with the applicant which were available to perform the work, or evidence that there were sufficient unemployed members of the applicant available under the hiring provisions of the collective agreement. Even so, the Board still had no evidence before it from which it could quantify the loss. The applicant did not adduce evidence either by cross-examination of the respondent's witness, or through the direct knowledge of its own witnesses, which provided any basis for putting a dollar value on the loss of its members. For example, the cross-examination of the respondent's witness does not establish a global "labour cost" component of the respondent's own estimate of the job cost, and the direct evidence of the applicant's own witnesses does not reveal any direct knowledge of the hours worked in contravention of the collective agreement. One of the obvious means available to the applicant to adduce such evidence was to summons the subcontractor and the time records for his equipment and employees. The evidence which the applicant elec-

ted to rely on consisted of an estimate of the dollar value of wages and benefits lost based on observations of the number of days the subcontractor had equipment and operators on the job site. The observations were supplied by a member of the applicant employed on the job site, but not by the respondent or its subcontractor. The witness through whom the document containing the summary was introduced had no direct knowledge of the number of days that the subcontractor had equipment and operators on the respondent's job or on the job site. The person who had made the observations was not called to testify. Therefore, the very basis on which the applicant's summary of losses was calculated is hearsay.

5. This is not a situation where it can be said that hearsay was either the only evidence or the best evidence available to the applicant. While the case law cited by applicant counsel in his request for reconsideration may suggest that the Board, when sitting as a board of arbitration under section 124 of the Act, may admit hearsay evidence, nothing requires the Board to rely on it. The Board's decision shows that it chose not to rely on the applicant's evidence described above. The reconsideration raises no grounds which would cause the Board to vary or revoke that part of its decision.

6. We turn now to the applicant's alternate grounds for reconsideration, namely, that it is entitled to damages whether or not it had established that it had union members available who would have performed the work in question if not for the respondent's violation. This is not a question of the Board relying on a technicality and ignoring the substance. Nothing in the law cited by the applicant refutes the proposition that the authority and jurisdiction of the Board acting under section 124 is to *compensate* for loss suffered as a result of the violation. The Board has no authority to *punish* an employer for a breach. If the result is to permit an employer who had violated the collective agreement not having to remedy the violation, it is not because of the ineffectiveness of the arbitration process, as the applicant characterizes it. The arbitration process is intended as a means of remedying losses suffered as a result of a violation. If no remedy is forthcoming, it is because of the applicant's inability or failure to establish that the violation resulted in any loss. This the Board finds not to be contrary to the policy behind the arbitration process or of the *Labour Relations Act*.

7. In view of the foregoing, the Board is of the view that there is nothing in the submissions of the applicant which warrants reconsideration of the Board's decision. Accordingly, this application for reconsideration is dismissed.

2781-86-R Sheet Metal Workers' International Association, Local 562, Applicant v. Ridsdale Steel Fabricators Inc., Respondent v. Employee, Objector

Certification - Construction Industry - Employer engaged in fabricating and installing metal products in the construction industry - Same work force used for both activities - Respondent's argument that application should be treated as one made under the general provisions of the Act rejected - Application properly made pursuant to the construction industry provisions

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. Wilson* and *J. Redshaw*.

APPEARANCES: *L. Steinberg* and *C. Coffin* for the applicant; *Ian S. Campbell* and *Doug Ridsdale* for the respondent; *Ken Brueckner* for the objector.

DECISION OF THE BOARD; April 21, 1987

1. This application for certification was heard on March 20, 1987 at which time the Board directed that certificates issue to the applicant effective that same date.

2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) of the Act on April 28, 1986, that designated employee bargaining agency is the Sheet Metal Workers International Association and the Ontario Sheet Metal Workers Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 269 of the Sheet Metal Workers International Association.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The applicant sought to represent a bargaining unit of journeyman sheet metal workers and registered sheet metal apprentices, save and except non-working foremen and those above that rank, employed by the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry throughout Ontario, and also such employees of the respondent in all other sectors of the construction industry in Board Area No. 6. In its Reply, the respondent states that only one of the four employees affected by this application performs work within the "construction industry" as defined by section 1(1)(f) of the Act. It asserts that the application

should therefore be treated as having been made under the general provisions (sections 5, 6, and 7) of the Act, rather than under the construction industry provisions.

5. At the hearing, the applicant accepted as substantially correct the respondent's description of its business as a manufacturer of custom steel products as set out in the Reply. The respondent operates a custom steel fabricating shop producing steel products for manufacturing companies in the Cambridge area, including parts for fans, brackets for the furniture industry, parts for oil filtration systems, and parts for industrial dust collecting systems. Some of these products are manufactured to be installed by the customer. Other products are manufactured and installed by the respondent's employees. The parties also agreed to the following facts:

- (a) Gerhard Haas spends virtually 100% of his time at work in on-site installation of products fabricated by the respondent in its shop. Only occasionally does he work in the shop.
- (b) Ken Brueckner is a working foreman. He spends approximately 77.4% of his time at work in the respondent's shop. His remaining time (i.e., 22.6%) is spent in on-site installation work.
- (c) Dennis Burger and Hugh Rendle spend between 64% and 73% of their time at work in the respondent's shop. The rest of the time (27% to 36%), they are engaged in on-site installation.
- (d) 50% of the jobs worked on by Messrs. Brueckner, Burger and Rendle are "manufacturing" jobs; that is, they involve only fabricating products to the customer's specification. The other 50% of the jobs they work on involve both fabrication and on-site installation; that is, the product is fabricated by one or more of Messrs. Brueckner, Burger and Rendle and is installed on site by Mr. Haas or one or more of Brueckner, Burger and Rendle. On the fabrication and installation jobs, 60% of the work time is spent fabricating the product and 40% of the time is spent installing.
- (e) The installation work is construction work.
- (f) All of the named employees report to work at the respondent's shop at 20 Hobson Street and all are supervised by Mr. Brueckner the working foreman.

6. In addition, Mr. Cliff Coffin, the applicant's business manager for the past 13 years, testified that all of the 15 to 18 sheet metal contractors in his "area" operate fabricating shops in the same manner as this respondent. That is, they have their own shops and both install what they have fabricated for the customer and fabricated without doing the installation. In cross-examination, he agreed that the majority of the business done by these fifteen to eighteen other sheet metal contractors was fabricating and installing product for their customers and that the fabricating only portion of their business was relatively small. Finally, the applicant produced a provincial collective agreement for 1986 to 1988 between the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference which refers to both shop fabrication and on-site installation.

7. Counsel for the respondent argued that because the company uses the same work force for what he submits are mixed construction (the installation) and non-construction (the fabrica-

tion) activities, this application should be treated as one made under the general provisions of the Act. In support of its submission, he referred to the Board's decisions in *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962; *Warren Bitulithic Limited*, [1981] OLRB Rep. March 376 and *Dominion Paving Limited*, [1981] OLRB Rep. Oct. 1370.

8. Counsel for the applicant submitted that the three employees who spent more of their time in the respondent's shop fabricating than they do on the job site installing are employees in the construction industry within the meaning of clause (b) of section 117 of the Act. He submits that *Ethier Sand & Gravel Limited*, *supra*, insofar as it stands for the proposition that an employer which engages in construction and non-construction activities with the same work force is not an employer in the construction industry, is wrongly decided or, in the alternative, that it does not apply to the facts of this case. Counsel referred us to the Board's decisions in *Metro Railing Ltd.*, [1986] OLRB Rep. Dec. 1731; *Esam Construction Limited*, [1980] OLRB Rep. Feb. 197; *Cooper's Crane Rental Limited*, [1980] OLRB Rep. Sept. 1286; *Stoney Creek Mechanical Limited*, (unreported decision in Board File No. 0169-83-M); *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; and Regulation 57 under the *Apprenticeship and Tradesmen's Qualification Act* R.S.O. 1980 Chapter 24.

9. In *Ethier Sand & Gravel Limited*, *supra*, one of the issues before the Board was whether or not the application for certification before the Board was properly brought under the construction industry provisions of the Act. In dealing with that issue, the Board said in part at paragraphs 8 and 9 that:

8. Before an application may be successfully made under the provisions of section 108 of *The Labour Relations Act*, it is necessary for an applicant to establish not only that it is a trade union within the meaning of section 117(f) but also that the employer is an employer within the meaning of section 117(c) and that the employees are employees within the meaning of section 117(b). *With respect to section 117(b), the applicant might well have been able to establish that the employees affected by the application are employees within the meaning of that subsection if it had called any evidence on this point.* Since no evidence was called on this point, the Board is not prepared to find that the employees who are affected by this application are employees within the meaning of section 117(b) of *The Labour Relations Act*.

9. *The respondent performs essentially the work of a supplier of materials to employers who apparently operate businesses in the construction industry. As a secondary feature, the respondent constructs roads from its own materials.* There is no doubt that the construction of roads is included in the definition of "construction industry" in section 1(1)(f) of *The Labour Relations Act*. The delivery of materials to employers who are engaged in performing work at the site of the construction of roads is not the operation of a business engaged in construction of "works" at the site thereof and does not fall within the definition of "construction industry" within the meaning of section 1(1)(f). See the *Cedarhurst Paving Co. Limited* case, [1964] OLRB Rep. Dec. 442. *The respondent, on the facts before the Board, is engaged in operations which essentially fall outside the definition of "construction industry" in section 1(1)(f) and as a secondary feature is engaged in operations which fall within the definition of "construction industry" within the meaning of section 1(1)(f). Where an employer is engaged in the construction and non-construction activities with the same work force, the Board has held that such mixed activities do not fall within the meaning of "construction industry" in section 1(1)(f) and that such an employer is not an employer as defined in section 117(c) of the Labour Relations Act.* See the *John Harvie Limited* case [1969] OLRB Rep. April 145; and the *Canadian Pittsburgh Industries Limited* case, Board File No. 15984-69-M.

[emphasis added]

In *Ethier Sand & Gravel Limited*, the Board did not have before it an employer that operated a fabricating shop, a mode of operation that is common in the sheet metal business. Further, both of the decisions cited as authority for the proposition that an employer who engaged in construction

and non-construction activities with the same work force is not an employer in the construction industry were made prior to the enactment of the *Labour Relations Amendment Act* Statute of Ontario, 1970 (No. 2) c. 85, section 39 which introduced what is now clause (c) of section 117 of the Act and defined who is an 'employee' in the construction industry for the first time. Prior to that, as for example in its *John Harvie Limited*, [1969] OLRB Rep. April 145 and *Canadian Pittsburgh Industries Limited*, Board File No. 15984-69-M decisions, the Board had excluded shop, yard, and other off-site employees from bargaining units when considering applications for certification under the construction industry provisions of the Act.

10. Clauses (b) and (c) of section 117 of the *Labour Relations Act* define "employee" and "employer" in the construction industry as follows:

- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining unit with on-site employees;
- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

Nowhere in the Act is it stipulated that a person must operate a business that is engaged solely or even primarily in the construction industry in order for that person to be an employer in the construction industry. Nor has the Board required that a person's business be operated solely or primarily in the construction industry in order for that person to be an employer in the construction industry (see, *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831 and the Board decisions cited therein at paragraph 10). Similarly, there is no requirement that an employee perform a majority or any of his work on a construction site in order to be an employee in the construction industry. It is sufficient for an employee to be "commonly associated in his work or bargaining with on-site employees". Consequently, it is not correct, in our view, to say that an employer engaged in construction and non-construction activities with the same work force cannot be an employer in the construction industry.

11. *Dominion Paving Limited*, *supra*, illustrates the Board's response, where, in an application for certification, the respondent employer carries on both construction and non-construction activities with essentially different work forces. That response, which was underlined in *Metro Railing Ltd.*, *supra*, is to group the employees into separate construction and non-construction bargaining units. In *Esam Construction Limited*, *supra*, the Board included in a construction bargaining unit two employees who were not working on a construction site on the date of application but who did regularly spend time on such a site. The Board also found that an employee engaged solely in off-site work that was in its entirety destined directly or indirectly for the job site to be included in the same construction bargaining unit. The Board reasoned that all three employees were commonly associated in their work with on-site employees within the meaning of what is now clause (b) of section 117 of the Act. It is in cases where off-site employees are only rarely, uncommonly, or briefly required to work on-site that the Board does not include them in a construction bargaining unit with the on-site employees (see for example, *Taggart Construction Limited*, [1974] OLRB Rep. March 190; *C. A. Pitts Engineering Construction Ltd.*, [1973] OLRB Rep. Feb. 123).

12. On the facts before the Board, in this case, we were satisfied that although the respondent does not operate exclusively within the construction industry, it does operate a business in the construction industry within the meaning of clause (c) of section 117 of the Act. The respondent does more than simply supply materials to other businesses. A significant part of its operation involves the on-site installation of sheet metal products which is clearly construction work. We were also satisfied that Gerhard Haas, Ken Brueckner, Dennis Burger and Hugh Rendle, are all

employees in the construction industry within the meaning of clause (b) of section 117. Mr. Haas spends virtually all of his time on construction sites, doing construction work. Messrs. Brueckner, Burger and Rendle all regularly and commonly spend a significant portion of their time doing the same kind of construction work as Mr. Haas. In addition, a substantial portion of their off-site work is directly related to the on-site construction work. Further, it was evident that the applicant commonly bargains on behalf of journeymen sheet metal workers and registered apprentices who, like Messrs. Brueckner, Burger and Rendle, are engaged in fabricating and installing metal products in the construction industry. In the result we were satisfied that all three are commonly associated in their work, and would usually be commonly associated in their bargaining, with the on-site employee, Mr. Haas. Accordingly, we ruled that all four men are properly included in the bargaining unit applied for by the applicant and that this application was properly made pursuant to the construction industry provisions of the Act.

13. Mr. Brueckner attended the hearing and expressed a concern with respect to the impact of certification of the applicant on employees of the respondent who presently do sheet metal work but who are neither journeymen sheet metal workers nor registered sheet metal apprentices. That is not a matter that properly enters into the Board's considerations when it deals with an application for certification. We find it appropriate only to make two observations. First, it appears that, in the Province of Ontario, only journeymen sheet metal workers and registered sheet metal apprentices are entitled to work or be employed in the sheet metal trade (see *The Apprenticeship and Tradesmen's Qualification Act, supra*, and Regulations thereunder; *Irvcon Roofing & Sheet Metal (Pembroke) Ltd., supra*). Second, the respondent appears to employ some people in non-sheet metal work and may have some flexibility in work assignments.

14. Having regard to all of the evidence before it, the Board finds, pursuant to section 144(1) of the Act, that all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. On the basis of the material filed with the Board and having regard to the Board's finding with respect to the bargaining unit description, the Board finds that there were four employees in the bargaining unit on the date this application was made.

16. In support of its application for certification, the applicant trade union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The union filed three such cards, all of which bear the name of an employee in the bargaining unit. These cards each contain the original signature of an employee, and the receipts, which are countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made to the union with respect to membership fees within the six month period immediately preceding the terminal date in this application. The cards and money were collected by one person and the membership evidence is supported by a duly completed Form 80 Declaration Concerning Membership Documents, Construction Industry, which attests to the regularity and sufficiency thereof. In short, the form and content of the membership evidence are consistent with the requirements of section 1(1)(l) of the Act.

17. There was a statement of desire indicating opposition to the certification of the appli-

cant filed. The Board finds that the statement of desire is not relevant to its considerations because, even if it is voluntary (the test of admissibility), it would not raise a sufficient doubt concerning the continued support for certification of the applicant such as to cause the Board to exercise its discretion to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 20, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

19. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial or institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate dated March 20, 1987 will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employment of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

20. Further, pursuant to section 144(2) of the Act, a certificate dated March 20, 1987 will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2388-85-R Labourers' International Union of North America, Local 1036, Applicant v. **Stone & Webster Canada Limited**, Respondent v. International Union of Operating Engineers, Local 793, Intervener.

Bargaining Unit - Certification - Construction Industry - Applicant seeking to represent construction labourers of the employer - Applicant requesting clarity note that employees engaged in survey work included in unit - Applicant having a history of representing employees of surveying companies that do not operate as employers in the construction industry - Intervener having a history of acquiring bargaining rights under the construction industry provisions for employees engaged as surveyors and designated to represent surveyors in the ICI sector - Application dismissed - No one on employee list who was a construction labourer who had engaged in survey work and surveying not included in applicant's designation order

BEFORE: R. A. Furness, Vice-Chair, and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: L. A. Richmond and B. Suppa for the applicant; Mark Contini and Robert Black for the respondent; Jack J. Slaughter, Joe Mihalich and George Palanuk for the intervener.

DECISION OF THE BOARD: April 21, 1987

1. The name of the respondent is amended to read: "Stone & Webster Canada Limited".
2. The applicant has applied for certification with respect to a proposed bargaining unit of "all unrepresented construction labourers in the employ of the respondent including all field employees engaged in surveying operations in the industrial, commercial and institutional sector of the construction industry of the Province of Ontario and all sectors of the construction industry in Board Area No. 21 save and except non-working foremen and persons above the rank of non-working foreman". During the course of the hearing, however, the applicant amended its proposed bargaining unit to read "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province and all construction labourers in all other sectors of the construction industry except the industrial, commercial and institutional sector of the construction industry in the District of Algoma south of the 49th parallel of latitude, save and except non-working foreman and persons above the rank of non-working foreman, persons covered by a subsisting collective agreement between the applicant and the respondent, certificates of the Board and written voluntary recognition agreements". The applicant also proposed a clarity which stated, "For the purpose of clarity the Board declares that employees engaged in survey work are included in the bargaining unit".
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.
4. The intervener sought to establish its status to appear as a party in this application. The intervener did not file a collective agreement which covered anyone affected by this application. In addition, the intervener advised the Board that it was not in a position to call evidence that it had membership evidence for anyone affected by this application. In these circumstances, after listening to the representations of the applicant, the respondent and the intervener, the Board ruled that the intervener had not established its status to intervene in this application and dismissed the intervention.
5. The employees who are affected by this application are classified by the respondent as

surveyor rodman, surveyor levelman or surveyor instrumentman. The Board heard evidence from employees in each of these categories who worked for the respondent in its surveying work in connection with the construction of a steel rolling mill at The Algoma Steel Corporation, Limited, in Sault Ste. Marie (the "project"). The Board also heard evidence from William Suppa, the northern Ontario representative for the Ontario Provincial District Council, and from James Dalrymple, a professional engineer employed by the respondent as the project manager at the project.

6. The instrumentman spends the majority of his time field checking the concrete pours and the placements of anchor bolts, inserts and conduits. In addition, he sets control lines. Occasionally a levelman would use a transit on the project and assist in establishing a control line. It is the instrumentman's responsibility to check anchor bolts. In order to accomplish this, hand tapes or chains and hand levels are used and held by a levelman or a rodman. Sometimes it is necessary to use a transit where the anchor bolt has to be set to a tight tolerance. The instrumentman takes the readings and the levelman and rodman ensure that the chains are properly positioned on the templet. The instrumentman may also determine levels or grades from a bench mark. He sights through, takes the reading, sets up the line and installs a stake with a hammer. He also makes the necessary calculations and uses blueprints to determine where the line is to be set. The levelman and rodman use tapes and chains under the direction of the instrumentman in order to establish offset points. It is also a major duty of the instrumentman on the project to do the layout work so that the outer limits of an excavation can be fixed on the ground. This requires the levelman and rodman to use the chains and install the stakes under the direction of the instrumentman. The instrumentman receives his instructions from the engineering foreman and assists the labourers with sketches of locations on the project from blueprints.

7. The instrumentman received two years of training at Sault College as a civil engineering technician. After this training he was able to carry out his duties as an instrumentman. However, not all instrumentmen graduate from such a college and some instrumentmen on the project have had actual work experience. The instrumentman is responsible for the work and accuracy of the levelman and rodman who together make up a three-man crew. The instrumentman is also responsible for the accuracy of the work of his crew and checks their work and maintains accurate records. Measurements on the project are approximately equally divided between systems adhering to the imperial measurements and metric measurements. The instrumentman is required to be thoroughly familiar with both systems. In his work trigonometry is used to determine distances and angles.

8. The levelman who gave evidence, while he had no previous surveying experience, had a technical background in computer and electrical technology by studying at a community college. He commenced employment with the respondent as a rodman and after almost three months became a levelman. As a rodman he received instructions from the instrumentman or the levelman on how and where to hold the rod, chain or tape and where to drive the stake. As a rodman he did not have to make calculations. As a levelman his main instrument was a level and he spent most of his time establishing elevations from bench marks. As a levelman he did not establish control lines and used a transit only under the supervision of an instrumentman. He used trigonometry in the form of sine formulas to calculate the elevation of slopes. However, he did not calculate and locate curves in his work as a levelman. Despite his technical background it took him three months to learn how to be a levelman. As a levelman he was required to read and understand blueprints.

9. The rodman who gave evidence had attended a community college and studied to be a civil engineering technician. However, he did not graduate. In his opinion, while his courses at the college helped him to understand what was going on at the project they did not assist him to do his job as a rodman. The job of rodman essentially consisted of holding a rod plumb, taking instruc-

tions and driving in stakes. He was not required to make calculations. Whenever the crew was short a man they would use a carpenter or a labourer to do the work of a rodman. While there was an opportunity to learn for those who were ambitious, he was never told he would be trained as a levelman or an instrumentman and he never expected to receive training. The rodman did not feel that a secondary school education was necessary in order to do his job.

10. The Labourers' International Union of North America has offered a course on pipelaying and concrete for members of its participating local trade unions. This course lasts between five and six weeks and is taught in a classroom and on jobs. The instruction is for seven hours a day and five days a week. This course is offered by presenters who travel around Ontario and was offered in 1983 and 1984. At the conclusion of the course the participants are informally tested and receive certificates for having completed the course. The participants spend part of the first and second weeks receiving instruction in basic blueprints, use of a transit and layout work. Part of the second week is spent in training how to prepare grades with reference to the level, the laser, and the laying of pipe with the laser. At the end of the course the earlier material is reviewed. None of the respondent's employees who attended the course became either instrumentmen or levelmen.

11. Mr. Suppa stated that out of a membership of more than six hundred there were between six and twelve surveyors in the membership of the applicant. However, he was able to supply the name of only one person who had been referred to employment by the applicant as a surveyor. In April of 1984, Kenneth F. Johnston was apparently referred to employment with Bird Construction for placement as a surveyor. Mr. Suppa informed the Board that the job with Bird Construction involved the construction of a sewage treatment plant and that this work was performed under the labourers' provincial collective agreement for the industrial, commercial and institutional sector of the construction industry. On this job Mr. Johnston set up lines for excavating using a transit and a plumb-bob and drove in stakes. There is not a classification for surveyors under the labourers' provincial collective agreement and Mr. Suppa expressed the view that Mr. Johnston's rate of pay would be fixed by negotiation and that he received at least the labourers' rate and perhaps more. Mr. Suppa gave evidence that the province-wide formwork collective agreement between The Ontario Form Work Association and The Form Work Council of Ontario was applied within the applicant's geographic jurisdiction when a forest insect laboratory was constructed in 1985. The applicant's members were employed on that job when a non-union general contractor subcontracted the forming work to Creston Construction Limited which is covered by the formwork collective agreement. On that job members of the applicant held rods and used a transit to establish grades for backfill and excavating and checked formwork and rebar with a transit. An apartment building was also constructed under the formwork collective agreement when the applicant's members performed work with a transit and rods. The formwork collective agreement includes a classification for layout men.

12. The international is also a party to the Labourers Distribution Pipeline Agreement for Canada. Members of the applicant have been employed under this national collective agreement. The definition sections of this national collective agreement state:

3. "Rodman, Chainman, or Stakeman" means a labourer employed to assist the Survey Instrument Man in running line, measuring pipe and/or right-of-way, and other survey work for the Employer.
11. "Grader" means a qualified labourer employed in hand working ditch bottom to maintain required grade where grade stakes have been set.

There are wage classifications in this national collective agreement for rodman, chainman, stake-man, pipefinder and flagman as one group and also for grader for another group. The latter group

is at a higher rate of pay than the former group. It was the testimony of Mr. Suppa that the grader does not use instruments and that the grader would clear a ditch in response to directions from an instrumentman as to whether the ditch was on grade. While Mr. Suppa gave evidence that members of the applicant would use a transit in pipeline distribution work, the definitions in this national collective agreement do not appear to support his testimony.

13. Mr. Dalrymple stated that each of the three classifications of instrumentman, levelman and rodman are surveyors as that word is commonly understood in the construction industry. It is the practice of the respondent to seek people from community colleges and then train them with the hope that people with ambition and skill will respond and progress. While the respondent hoped that the three members of a crew will be interchangeable, the reality was that they were not interchangeable because of the nature of the work and the requirement of formal training. He informed the Board that it was part of the understanding that members of a crew would receive training in the field. However, the reality was that no one was told that he would automatically move up and there was little formal training by the respondent. The survey crews on the project were not represented by the intervener and there was never a claim to such representation. The respondent is bound by the provincial collective agreements in the industrial, commercial and institutional sector of the construction industry with respect to labourers and operating engineers.

14. There was no evidence before the Board that the applicant had previously sought to obtain bargaining rights for employees engaged as surveyors. However, the evidence before the Board established that Labourers' International Union of North America, Local 183 ("Local 183") was successful in obtaining twelve certificates from the Board between May 1, 1978, and April 9, 1981, for bargaining units of "all field employees engaged in surveying operations in and out of (municipalities in southern Ontario, usually Metropolitan Toronto), save and except party chiefs, persons above the rank of party chief, sales, office and clerical staff". Of these twelve certificates, ten were obtained in 1980. These applications for certification involved survey companies as opposed to construction companies and were not determined by the Board to be applications for certification within the meaning of what is now section 119 of the *Labour Relations Act*. These bargaining units were determined by the Board under the provisions of section 6(1) of the *Labour Relations Act*. From the evidence before the Board, it appears that Local 183 signed five collective agreements which covered employees engaged in surveying operations.

15. From the evidence before the Board, it appeared that the International Union of Operating Engineers, Local 793 ("Local 793") had applied to the Board to be certified as the bargaining agent of employees engaged as surveyors for several construction companies. From a recital in a collective agreement between the Sarnia Construction Association and Local 793 which was admitted in evidence, it appeared that jurisdiction over non-professional survey crews had been transferred to the International Union of Operating Engineers in a letter dated January 25, 1965, from the American Federation of Technical Engineers. The earliest certificate in evidence before the Board was issued by the Board to Local 793 in 1968. The bargaining unit in that case was "all instrumentmen, rodmen and chainmen (in a geographic area) save and except party chief and those above the rank of party chief". Over the next ten years the Board issued twelve certificates to Local 793 with bargaining units defined in similar terms in various geographic areas in Ontario. Each of these applications for certification was entertained by the Board as an application for certification under the construction industry provisions of the *Labour Relations Act*. Since the advent of the legislative scheme of provincial bargaining in the industrial, commercial and institutional sector of the construction industry in 1978 the Board has issued a number of certificates to Local 793 with respect to bargaining units defined in terms of the standard bargaining unit description of operating engineers and employees engaged as surveyors or confined to employees engaged as surveyors with no reference to operating engineers. The most recent certificate which was referred to the Board was

issued in 1982. The provincial collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency contains a schedule which covers and applies to employers engaged in survey work within the Province of Ontario. The schedule refers to the classifications of instrumentman, senior and junior rodman, chainman and party chief. The schedule also sets out the scope of their duties and responsibilities. Local 793 has entered into sixteen collective agreements which cover "employees engaged as surveyors, in all sectors of the construction industry in the Province of Ontario and engaged in any such work outside of the construction industry in the said Province".

16. From the evidence before the Board it is clear that Local 793 has a history of acquiring bargaining rights for employees engaged as surveyors and of entering into collective agreements with respect to such employees. Moreover, the acquisition and exercise of these bargaining rights has occurred within the construction industry across the Province of Ontario. The Labourers' International Union's history in acquiring and exercising bargaining rights for employees engaged as surveyors is limited to Local 183, confined to the area around Metropolitan Toronto and is limited to survey companies that do not operate as employers in the construction industry. The bargaining history of Local 793 with respect to employees engaged as surveyors is of a far greater extent and is far more pertinent to the construction industry than is any comparable history within the Labourers' International Union. This bargaining history appears to have been recognized by the Minister of Labour when on March 31, 1978, she designated Local 793 and the International Union of Operating Engineers as the employee bargaining agency to represent employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario pursuant to section 139(1)(a) of the *Labour Relations Act*.

17. The terms "surveying" and "surveyors" cover a range of activities. Surveying may be regarded as the process of measuring and delineating the contours, dimensions and positions of any part of the earth's surface and the relationship of one point relative to any other point. Surveying on the earth's surface involves the intricacies of geodetic surveying down to the simple surveys performed by municipalities and on construction sites. On construction sites the complexity and permanence of the job will dictate whether the surveying will require co-ordinates and the construction of a grid on a plan or simply the determination and sketching of lines, curves and angles during the initial aspects of construction. The term surveyors likewise embraces a range of abilities and training. Not all surveyors are covered by the *Labour Relations Act* and section 1(3)(a) specifically states that, subject to section 90, for the purposes of the *Labour Relations Act*, no person shall be deemed to be an employee who is a member of the land surveying profession entitled to practise in Ontario and employed in a professional capacity. Ontario land surveyors are covered by this exclusion. The employees who are affected by this application are not members of the land surveying profession. These employees are non-professional surveyors as that term is commonly understood in the construction industry. The interpretation given to "surveying" and "surveyors" also varies on construction sites even among construction trade unions. This is particularly true with respect to layout work which is sometimes considered to be outside the term "surveyors". For example, in *Commonwealth Construction Company Limited* (Board File No. 1630-76-R, decision dated January 11, 1977), the Board in determining an appropriate bargaining unit of surveyors on an application by Local 793, excluded from the bargaining unit, by a clarity note, "a person who uses any instrument or tool for layout work incidental to the trade of carpentry". In that case the employer was bound by a collective agreement which included a specific reservation of such work for carpenters. Moreover, the definitions of "rodman, chainman or stakeman" and "grader" referred to in paragraph 12 indicate that they do not use instruments notwithstanding their titles.

18. The evidence established that there are differences in skill and ability among the classifications of rodman, levelman and instrumentman. It is readily apparent that a rodman may be

adequately trained on the job in a matter of days. In the case of a levelman and an instrumentman, the necessary skill and ability is produced by post-secondary instruction and training with on-the-job experience. There was evidence that on this project construction labourers could and did become rodmen. There was no similar evidence with respect to construction labourers who became levelmen and instrumentmen. The applicant may well number among its membership individuals who are competent levelmen or instrumentmen. However, there was no evidence that on this project any of the levelmen or instrumentmen were construction labourers. The course on pipelaying and concrete offered by the International offered an opportunity for construction labourers to understand the uses of surveying and no doubt takes some of the mystery out of the process. It appears to the Board that the part of the course dealing with surveying enables construction labourers with ability and ambition to become levelmen and then instrumentmen. Having regard to the unchallenged evidence before the Board, such a course does not produce competent levelmen or instrumentmen. On the evidence before the Board, there was no one on the list of employees who was a construction labourer who had engaged in survey work. There was reference to a Ken Cameron who had worked as a construction labourer and who had had his classification changed to rodman. However, Mr. Cameron's name did not appear on the list of employees who would fall within the bargaining unit and accompanying clarity note proposed by the applicant. Having regard to the provisions of section 6(1), this application is dismissed.

19. The Board also examines the effect of the provisions of the *Labour Relations Act* on this application for certification. This application is an application for certification under section 144(1) of the *Labour Relations Act*. Section 144(1) of the Act provides:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

Such an application may be brought by either an employee bargaining agency or one or more affiliated bargaining agents of an affiliated bargaining agency on behalf of all affiliated bargaining agents of the employee bargaining agency. The unit of employees is required to include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area. It was agreed that the applicant is an affiliated bargaining agent. The evidence before the Board does not establish that the applicant is a bargaining agent that, according to established trade union practice in the construction industry, represents employees engaged in survey work who commonly bargain separately and apart from other employees within the meaning of section 137(1)(a) of the *Labour Relations Act*.

20. In *Clarence G. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, the Board held that section 144 of the *Labour Relations Act* deals with all possible applications for certification in the construction industry. Since this application refers to the industrial, commercial and institutional sector of the construction industry, it may only be made pursuant to section 144(1). In *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407, the Board considered the requirements of section 144(1) and stated in paragraphs 34 and 35 at pages 423-424 as follows:

34. Section 144(1) also sets certain requirements for the bargaining unit that will be appropriate. It stipulates that:

“...the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.”

[emphasis added]

35. A provincial agreement is, by definition, a collective agreement which, amongst other things, contains provisions respecting “...the rights, privileges or duties of...the affiliated bargaining agents represented by the employee bargaining agency...” and provisions respecting “...terms or conditions of employment of...the employees represented by the affiliated bargaining agents and employed in the [ICI] sector...”. Thus a provincial agreement deals with the bargaining rights held by affiliated bargaining agents represented by their employee bargaining agency. In turn, the first requirement of the definition of “affiliated bargaining agent” in section 137(1)(a), as noted at paragraph 30, is that it be a bargaining agent that “...according to establish trade union practice in the construction industry, bargains separately and apart from other employees...”. From reading those two definitions together, and in the context of the requirement of section 144(1) that “...the unit of employees shall include all employees who would be bound by a provincial agreement...”, it may be seen that those employees represented by the trade union making application under subsection 1 “...who commonly bargain separately and apart from other employees...” are the ones who would be covered by a provincial agreement.

21. The applicant is seeking to represent members of a bargaining unit engaged in survey work. In the designation order referred to in paragraph 16, the Minister of Labour has designated Local 793 and the International Union of Operating Engineers as the employee bargaining agency to represent employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The terms “engaged in survey work” and “engaged as surveyors” appear to the Board to encompass the same work. There is no doubt that the applicant is seeking to represent in collective bargaining employees who are included in this designation, notwithstanding the description of the proposed bargaining unit and the accompanying clarity note. Such a designation order not only states who the designated agents are, they also designate the trade which belongs to each designated agent in the construction industry. In *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589, the Board stated at page 1598 as follows:

Equally important, it is the Minister’s function pursuant to this subsection [section 139(1)(a)] to “describe those provincial units”. In other words, the Act gives the Minister the power to describe the appropriate provincial unit with respect to the province-wide scheme set out under various sections of the Act as discussed above. Those designation orders do not merely indicate who the designated agents are, but they designate the trades or crafts that, in a sense, belong to each agent. If particular trades or crafts are not therefore given to employee bargaining agencies or their affiliated bargaining agents by the Minister’s designation order, then for purposes of an application pursuant to section 144(1) of the Act, the Board cannot describe a bargaining unit that includes such trades as it cannot determine an appropriate bargaining unit which includes trades or crafts other than as encompassed in the designation orders. If employee bargaining agencies or affiliated bargaining agents in the province-wide scheme want to represent trades or employees performing skills other than they have been assigned in a designation order, they can resort to section 139(5) of the Act which creates the mechanism for amending the designation orders. Alternatively, parties can argue that the performance of the skill or work in question is part of their designated trade or craft, and thus properly falls within the existing trade designation.

See also *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692.

22. The employee bargaining agency designation for the Labourers’ International Union of

North America and The Labourers' International Union of North America Ontario Provincial District Council does not refer to survey work or surveyors. The Board finds that it cannot determine an appropriate bargaining unit which includes trades other than the trades contained in the Labourers' designation order. On this additional ground this application is dismissed.

1403-85-M; 1647-85-R International Union of Operating Engineers, Local 793, Applicant, v. **Stucor Construction Ltd.**, Respondent; International Union of Operating Engineers, Local 793, Applicant v. Stewart & Hinan Construction Limited, Stewart & Hinan Contractors Limited, Stucor Construction Ltd., and Resource Equipment Limited, Respondents

Construction Industry - Sale of a Business - Cash proceeds from the liquidation of a partnership business used to start a new general contracting business by one of the partners - Essence of a business in a bid-oriented sector of the construction industry resides in management personnel's expertise - Transfer of key man services constituting sale of a business

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *S. B. D. Wahl* and *J. Redshaw* for the applicant; *Bruce Binning* and *Robin Stewart* for the respondents.

DECISION OF THE BOARD; April 2, 1987

1. Having regard to the evidence before the Board, the name of the respondent in File No. 1403-85-M has been amended to: "Stucor Construction Ltd."
2. The application in Board File No. 1403-85-M is a referral under section 124 of the *Labour Relations Act* of a grievance in the construction industry for final and binding arbitration. File No. 1647-85-R is a consolidated application made under subsection 4 of section 1 of the Act and section 63 of the Act. The applicant is seeking a declaration that Stucor Construction Ltd. and/or Resource Equipment Limited is/are bound to the Operating Engineers Provincial Agreement effective from May 1, 1984 until April 30, 1986, as a result of a sale of a business within the meaning of section 63 of the Act from Stewart & Hinan Construction Limited and/or Stewart & Hinan Contractors Limited or because Stucor Construction Ltd. and/or Resource Equipment Limited and Stewart & Hinan Construction Limited and/or Stewart & Hinan Contractors Limited carry on related activities or businesses under common direction or control and should be treated as one employer for purposes of the Act. The parties are agreed that the hearing into the grievance referral must await the resolution of the application in File No. 1647-85-R.
3. The names "Stewart" and "Hinan" appearing in the names of two of the respondents are the names of the persons Robin Stewart and Jack Hinan who were equal business partners engaged in a general contracting business in Ontario from early 1959 until late 1981. The corporate style and form of their business changed over the years, but throughout, Stewart and Hinan were equal owners and equal managers of their general contracting business. Their partnership ended only when Hinan decided in 1981 to retire from business. Stewart did not retire and continues to operate a general contracting business. The issue before the Board is whether there has been a sale

of the partnership business to Stewart's business within the meaning of section 63 of the Act. To characterize the issue another way, has all or part of the business of the partnership been transferred to Stewart's business and continued by it, or is Stewart's business simply a continuation of a like business? If the partnership business does not survive in Stewart's business, the issue in the alternative is, have the partnership and Stewart carried on related activities or businesses under common direction or control within the meaning of section 1(4) of the Act, and, if so, should the Board declare them to be one employer for purposes of the Act. A positive finding in either alternative would preserve in Stewart's business the bargaining rights which the applicant held for employees of the partnership's business.

4. The business which came to be operated as an equal partnership was started by Stewart in 1956 and was incorporated as Robin Stewart Construction Limited with Robin Stewart as the sole owner. Two months later, Stewart and Hinan entered into an agreement for Hinan to buy into the company and become an equal partner with Stewart. By February, 1959, they were equal partners and the name of the corporation was changed to Stewart-Hinan Corporation Limited. That company ceased doing construction work in August, 1969 and its corporate objectives were changed accordingly, as was its name. It became Stewart-Hinan Investments Limited (hereinafter "Investments"). A new corporation, Stewart & Hinan Construction Limited (hereinafter "Construction") had been formed in August, 1968. It took over the construction business employing working capital provided by Investments in return for preference shares in Construction. The preference shares were ultimately redeemed. At all times while Construction operated a general contracting business, Stewart and Hinan were equal owners directly and/or through their equal interests in Investments. The change in corporate form was made to protect the reserves which had built up in Stewart-Hinan Corporation Limited, now Investments. Construction underwent a similar restructuring in 1974. It ceased construction operations and the partners formed a new company, Stewart and Hinan Contractors Limited (hereinafter "Contractors") which was incorporated January 24, 1974. Its working capital was provided by Construction which took back preference shares in Contractors. Stewart and Hinan held the common shares equally. During all of these changes in corporate name and form, the business of the partnership continued uninterrupted. The employees in the business were doing the same work after each change as they had been doing immediately prior to the change. From 1974, the business was conducted from premises in Beamsville, Ontario, owned by Investments. There were two other tenants, Resource Rentals Ltd., a wholly-owned subsidiary of Investments, and a third tenant unrelated to the Stewart & Hinan companies. Resource Rentals Ltd. (hereinafter "Resource") had been incorporated for the purpose of carrying on the business of renting construction equipment.

5. Stewart and Hinan operated under the terms of a partnership agreement, first for Construction and, after Contractors was incorporated, for both Construction and Contractors. The agreement contained a buy/sell condition. When Hinan decided in 1981 to retire, he served notice on Stewart of his intent to withdraw from the businesses of Construction and Contractors and offered to sell his shares to Stewart, pursuant to the terms of the agreement. Stewart had the option to buy Hinan's shares or withdraw from the businesses. He chose the latter and, pursuant to the agreement, elected "...that the businesses of the said Companies be sold, liquidated or disposed of as we may mutually agree upon". The partners ultimately agreed to liquidate the businesses. Contractors ceased operations in October, 1981. Its salaried employees were given notice individually on October 5th, 1981, of the partners' decision to liquidate that company because of Hinan's wish to retire from business. They were also told that Stewart intended to continue in the general contracting business. Most of the salaried employees were terminated effective October 5th. They all received severance payments. Carpenters and labourers employed by Contractors were laid off pursuant to their respective collective agreements as the work of Contractors wound down. It last employed carpenters or labourers in November, 1981. Work performed during Octo-

ber and November was largely the wind-up of projects. Warranty work was subcontracted out, but not to Stewart's company. The fixed assets of Contractors were offered for sale to invited bidders. Contractors was formally dissolved on October 9, 1983 and Construction was formally dissolved on August 29, 1983.

6. Stewart and Hinan chose to liquidate the companies rather than sell them as going concerns for tax purposes. The assets of the two companies were converted to cash and the cash proceeds were distributed to the personal holding companies of Stewart and Hinan which had been set up for that purpose. Stewart's share went to D.R. Stewart Holdings Ltd. (hereinafter "Holdings").

7. As already mentioned, Stewart had announced his intention to remain in the general contracting business, but he wanted a smaller operation than the one which he and Hinan had operated as a partnership. That was why he decided not to buy out Hinan's interest in Contractors. To that end, Stewart incorporated Stewart & Hinan Contractors Corp. on September 28, 1981. Prior to incorporating the company in that name, he had tried unsuccessfully to get clearance on business names using either "Stewart" or "Stewart and Stewart". Hinan gave Stewart a release, without any consideration, to use the name "Stewart & Hinan". On May 15, 1984, the name of the corporation was changed to Stucor Construction Ltd. For ease of reference, the Board will use "Stucor" to refer to Stewart's business, unless the particular context requires the use of Stewart & Hinan Contractors Corp. or Stucor Construction Ltd. The working capital for Stucor came principally from the proceeds which were being held by Holdings from the dissolution of the partnership businesses. It held preference shares in Stucor and provided as well the guarantees for Stucor's bank credit and performance bonds.

8. All of the time while Stucor operated under its original corporate style of Stewart & Hinan Contractors Corp., it did so out of the same premises as Contractors had operated, but occupying less space. It continued to use the same telephone system as had been used by Contractors. Telephone callers for Stucor would have their calls answered by some of the same persons who had answered telephone calls directed to Contractors in the past. This was because Dave Harvey, Nancy Rossi, Dennis Kowalchuk, Vern Thorpe and Neil VandeLarr took employment with Stucor following their termination from Contractors. All but VandeLarr joined Stucor immediately on termination from Contractors. VandeLarr joined it after approximately a two week hiatus. Rossi had worked for Contractors as a secretary and continued in the same work with Stucor. Harvey was manager of field operations for Contractors and Kowalchuk and Thorpe were estimators, and all three of them continued in the same work for Stucor. VandeLarr had been a project co-ordinator for Contractors and continued in this work with Stucor but also worked in estimating and as a field superintendent. Earl Paterson, who had been one of Contractors' field superintendents joined Stucor in the same capacity approximately eight months after terminating from Contractors. Harvey had been working for the partnership's construction business since the 1960's. As manager of field operations for Contractors, he was responsible for the execution of the contracts which the business obtained. Part of his responsibility was to decide, in consultation with the project co-ordinators, how jobs were to be manned. The field superintendent would do the hiring according to those decisions. Harvey and the superintendents looked after grievances and Harvey handled other labour relations matters for Contractors. He performed the same kind of work for Stucor. Kowalchuk and Thorpe were the only estimators employed by Stucor when it first commenced business. They and Harvey eventually left in May, 1984 after Stucor moved its operation from the Beamsville location to St. Catharines. At that time, VandeLarr became manager of field operations for Stucor.

9. Contractors had been bound to collective agreements with the United Brotherhood of Carpenters and Joiners of America, the Labourers' International Union of North America and the

applicant. Stewart advised the local representatives of the carpenters and labourers that he had formed a new company to continue business as a general contractor. He did so because he had always been accustomed to employing carpenters and labourers on the work which Contractors and its predecessors had done and he expected to employ them in the work Stucor would be doing. In October, 1981, he bound Stucor to the provincial agreements of the carpenters and labourers at a time he was seeking to obtain a contract for concrete construction work. Stucor hired carpenters and labourers when it first began doing work in November, 1981. A significant number of the carpenters and labourers it hired had worked for Contractors, most of them having worked for Contractors within four to eight weeks prior to their hiring by Stucor.

10. The fixed assets of Contractors which were put up for sale included some construction equipment. Except for automobiles, that equipment included two dump trucks, four pick-up trucks, one deck trailer, three front-end loaders, eight office vans and six storage vans. Stucor bought one of the dump trucks, three of the pick-up trucks, six office trailers and four storage vans. Stucor did not buy any of the building materials, builders' hardware or hand tools sold by Contractors, except for two pieces of surveying equipment. It also bought some of Contractors' office furniture and fixtures. It is reasonable to infer from the evidence that Stucor acquired all of the office furniture and fixtures that it needed for its business.

11. Stucor had no contracts when it started business. It did not do any of the warranty work for Contractors after Contractors ceased its operations. Stucor got work in the same way that Contractors had, by bidding for it against other contractors, both through public and invited tenders. A significant amount of the contracts it obtained was by invited tender.

12. Respondent counsel argues that the liquidation of Contractors left nothing of its business to be transferred to Stucor which possibly could constitute a business in the hands of Stucor. The liquidation of Contractors was carried out for the sole purpose of permitting Hinan to retire and receive his 50 per cent share of the corporation's value. All of its assets were converted to cash and distributed to the two partners' personal holding companies. The employees were terminated and the salaried employees paid severance. All Stucor got was a few of Contractors' fixed assets for which there was no other buyer, some office furnishings, three of its 19 salaried employees, and, until Stewart could get clearance on a suitable name for his new business, the convenience of using the name "Stewart & Hinan". Stucor did not take over any of Contractors' contracts, rather it had to start afresh and secure its own contracts. The few elements of Contractors' business which can be found in Stucor by themselves cannot be said, counsel submits, to give Stucor the "dynamic quality" of a going concern referred to by the Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at paragraph 33, nor are they the essential elements of a business referred to in paragraph 34 of *Metropolitan Parking*, *supra*, and in *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, at paragraph 19, which would allow the Board to find that Contractors' business or a viable part of it, survives in Stucor. Paragraphs 33 and 34 of *Metropolitan Parking* and paragraph 19 of *Grand Valley Ready Mixed* state, respectively, as follows:

33. There need not be a transfer of the entire business before section 55 [now section 63] comes into play. The successor rights provisions may also be triggered by the transfer of "part of a business." [See section 55(1).] This language suggests that bargaining rights continue when something considerably less than "the totality of the undertaking" has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of "the business." The Board has found a transfer of "part of a business", where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right and means to produce one of the products formerly produced by

the predecessor's business; (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.*, [1971] OLRB Rep. May 515). In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, "know how" and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement LaFarge Ltd.*, [1975] OLRB Rep. Dec. 905, and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization - even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were "part" of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business", or "a part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a "new" business which resembles the "old" one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new "parallel" business which only incidentally made use of some of the tangible elements of the predecessor's business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. The Board was not satisfied that there had been a transfer and continuation of the predecessor's business (i.e., the business that he owns and operates) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

19. Did the alleged successor in this case obtain a part of the predecessor's business as would cause section 55 [now section 63] to operate? The answer is to be found in an examination of the two business organizations which existed prior to the transaction. In most section 55 [now section 63] applications, whether involving the alleged sale of the whole business or a part thereof, the nature of the alleged predecessor's business organization provides the ultimate answer. The Board identifies its essential elements and determines if sufficient of these have been transferred to the successor as to allow the business and the employment which it generates to continue. See *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467 and *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691. However, if as in *Canada Cement LeFarge*, [1977] OLRB Rep. Jan. 5, and *Darrigo Consolidated Holdings*, [1980] OLRB Rep. Jan. 29, assets have been disposed of which are peripheral or unrelated to the business organization to which the bargaining rights at issue attach, the Board will not find that there has been a sale of a business within the meaning of the section.

With respect to Stucor not taking over any of Contractors' contracts, respondent counsel contends

that Stucor, in having to start afresh to get contracts, was in the same predicament as the alleged successor business was in the Board's decision in *Raymond Cote*, [1968] OLRB Rep. March 1211. The Board saw that circumstance as an important factor in giving meaning to the word "business" in what is now section 63(2) of the Act. The Board's comments are at paragraph 6 of the decision and it is emphasized, last sentence of the paragraph from which counsel draws his parallel with Stucor's circumstances:

...

The meaning to be attached to the word "business" depends to a great extent on the nature of the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is "the totality of the undertaking". The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing a profit to assure its success. The total of these things along with certain intangibles such as good will constitute a business. In the instant case the equipment which Raymond obtained are the necessary tools for the performance of his contractual obligations but the equipment alone in this type of undertaking is not the business. It is essential in this particular type of endeavour to have the right to cut wood and a right to dispose of it. When Raymond obtained the contracts covering both of these ingredients he was in business and then was in a position to determine the ways and means of its operation. *In this regard an important consideration is that Raymond did not take over his father's contracts but negotiated and obtained contracts for his own account and on the representation that he had commenced his own business.*

In short, counsel argues that section 63 of the Act gives the Board jurisdiction to decide if there has been a sale and if what has been sold is a business. The cash proceeds from the liquidation of a business used to start a new business is not a sale of a business, and the section does not give the Board discretion to say that a liquidation of a business is a sale of the business.

13. The Board will not attempt to set out the detail of applicant counsel's argument, suffice to say the clear thrust of his argument may be stated briefly as follows. Stucor's entire capacity to carry on a business in the construction industry from its incorporation originated with Contractors. This is because of the following attributes of Contractors' business which counsel contends flowed through to Stucor. The reserves which had built up in Contractors were freed by its liquidation and provided Stucor with its starting working capital and the guarantees essential for its line of credit at the bank and for performance bonds which it needed in order to satisfy bid tender conditions. Stucor used the same bank branch as Contractors had used. The equipment which Stucor acquired from Contractors was sufficient for it to start business without acquiring more, having regard for the fact it continued Contractors' practice of renting most of its equipment requirements. Stucor also acquired all of the office furnishings needed to start business, leased some of the same space previously leased by Contractors and used the same telephone system as had been used by Contractors. The office staff, estimating capacity, field supervision and field forces with which Stucor started in business also came from Contractors and gave Stucor all of the management, technological and skill components needed to carry on the same kind of business, general contracting, as Contractors had at the scaled down level which Stewart said was his preference in remaining in the construction business. Most important of all, in applicant counsel's view, was the fact that Stucor got Stewart's personal reputation in the industry and with it the ability to attract business. Counsel submits that, on its facts, the instant case is a direct parallel to the *Base Electric Co. Ltd.*, [1978] OLRB Rep. Feb. 140, and closely analogous to the Board's decision in *Construction P. H. Grager Inc.*, [1985] OLRB Rep. Feb. 233. The Board found in both decisions, that there had been a sale of a business within the meaning of what is now section 63 of the Act. The first case was one in which the prior business was wound up because the four brothers who owned the corporation and operated the business no longer wanted to conduct business together. The new and old businesses

were that of electrical contracting. Counsel relies on it, in part, for the proposition that the reason for cessation of the prior business is irrelevant to a finding that there has been a section 63 sale of a business. He relies on the second case for the same reason and, as well, for the proposition that there is no special significance to the fact that one of the parties to the alleged sale is a partnership. In *P. H. Grager*, the prior company, a sole proprietorship, had been taken out of business, as a condition of the owner entering into a three-way partnership in Construction P. H. Grager Inc., the new corporation. The old and new businesses were in heavy construction.

14. The relevant provisions of section 63 of the Act are as follows:

(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

15. The Board's decision in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366, which issued between the *Base Electric* and *P. H. Grager* decisions relied on by applicant counsel, offers a thorough review of the Board's approach to and interpretation of section 63 up to that time. The analysis is found in paragraphs 19 through 26. While the analysis demonstrates application of the section to a broad array of circumstances, the Board in that case was dealing, in the end, with its application in a construction industry setting. It is not necessary to recite all of those paragraphs, but the last one nicely sets out the Board's dilemma every time it must decide whether what was sold, within the broad definition of "sale" in section 63, was a business. Therefore, it is useful to quote paragraph 26 of the decision:

26. All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a "mere sale of assets" and a sale of "part of a business." As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished [sic] on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

16. It is evident also from the Board's analysis that the statutory purpose of section 63 has been a paramount influence on what inferences and conclusions are to be drawn from the factual context of a particular case and, ultimately on how subsection 1 of section 63 has been interpreted. Paragraph 20 of *Tatham* describes the purpose of section 63 thus:

20. Section 55 [now section 63] prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." To accomplish this objective, the statute gives a very special meaning to the word "sale", envisages that bargaining rights can be continued in a severable "part" of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

It can be seen from that decision as a whole, some of the case references in it and its analysis of how the Board has interpreted the section, that its purpose has caused the Board to give the definition of a sale of a business a liberal rather than narrow interpretation.

17. Against that background, the Board cannot agree with respondent counsel that the particular manner in which Contractors was liquidated precludes the Board from finding that there has been a sale of its business, or part of it, to Stucor. For similar reasons, the Board disagrees with applicant counsel that the reason why the prior business ceased is irrelevant to whether there has been a section 63 sale. Clearly, these are factors which the Board must weigh and, if nothing else, they may properly influence how the Board interprets the evidence before it and the inferences it will draw from the factual context of a particular case. This particular case is one where both the predecessor employer and its alleged successor carried/carry on a general contracting business, primarily in the industrial, commercial and institutional sector of construction. They obtained business by being the successful bidder in either public or invited tender situations. As the Board commented at paragraph 10 of *P. H. Grager, supra*, "... the essence of a 'business' in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in the physical assets such as tools or a specific location". This is because, to be financially successful, the business needs not only the ability to price and bid jobs successfully, but it must be able to execute the jobs within the self-imposed limits of the bid price. If it lacks expertise in either element, it is unlikely to be successful. Stucor, at its onset, obtained persons who had a proven track record with Contractors and, of course, Stewart knew precisely the quality of the skills he was getting. Kowalchuk and Thorpe provided Stucor with the expertise in estimating what a job would cost. If a job was successfully bid, Harvey, as

manager of field operations in both businesses, had the overall expertise for organizing the materials, equipment and manpower to execute the job pursuant to the bid price. He also held the expertise to deal with the labour relations requirements of the business. VandeLarr provided the specialist skills of a project co-ordinator to see that these elements came together as planned and within the terms of the business contract with the client.

18. In *P. H. Grager, supra*, the Board found a sale of a business within the meaning of section 63 primarily on the transfer of management skills in the person of the sole proprietor of the unionized prior business to the new business formed by him and two other partners. Pierre Gratton, the sole proprietor who had shown some success in attracting jobs in the heavy construction sector, shelved his company in return for becoming one of three partners in a new enterprise in heavy construction. One of the other two partners provided all of the capital and his own expertise as an owner and operator of heavy construction equipment. The third partner was an expert in concrete forming construction. It was agreed they would be equal partners in the profits of the business. Except for the use of Gratton's home address to have the business registered in the Province of Quebec and the temporary use of his home telephone until a business telephone could be arranged, Gratton was the sole asset of the prior business acquired by the new one. In spite of the expertise which the other two partners brought to the new venture, the Board concluded the presence of Gratton's experience and expertise in bidding in the new business of which he is a partner, was a transfer to it of the chief assets of his prior company and enough to find "...that what has occurred on the facts of this case is a 'sale' of Mr. Gratton's 'business' to the new company...within the meaning of section 63 of the *Labour Relations Act*".

19. In the instant case, in addition to acquiring the experience and expertise of the four persons named above, Stucor got the experience and expertise of Stewart who gives direction to how the others' talents will be used by the business and who brings with him the ability to attract business and expertise in how to package job bids in order to do so. Stucor also acquired some of Contractors' fixed assets useful to a general contracting business, office furniture and fixtures, the use of its telephone system, and it operated its business out of part of the premises from which Contractors had operated its business. Furthermore, for the first two and one-half years, Stewart's new corporation benefitted from the use of the name "Stewart & Hinan" for the conduct of its business. In short, the elements of Contractors' business which were transferred to Stucor and are identifiable in its business were sufficient to enable Stucor to begin immediately to carry on substantially the same kind of general contracting business, although scaled down in size, involving performance of the same kinds of jobs and in the same market as had been the case with Contractors.

20. Having regard to the facts of this case, to the purpose of section 63 and the Board's established jurisprudence, the Board is satisfied that, within the meaning of section 63 of the Act, there has been a sale of part of the business of Stewart & Hinan Contractors Limited to Stewart & Hinan Contractors Corp., now operating as Stucor Construction Ltd.

21. In the result, Stucor Construction Ltd. is bound to the Operating Engineers Provincial Agreement which was in effect from May 1, 1984 to and including April 30, 1986, to the extent of the bargaining rights held at that time by the applicant.

22. In view of the Board's disposition of the application as it relates to section 63 of the Act, it is unnecessary for the Board to determine the application as it relates to section 1(4). Therefore, the application, insofar as it relates to section 1(4) of the Act, is dismissed with respect to Stewart & Hinan Construction Limited and Stucor Construction Ltd. There is no evidence that Resource Equipment Limited or Resource Rentak Ltd. has ever carried on business in the con-

struction industry within the meaning of the Act. Therefore, the application, as against them, is dismissed.

23. The Registrar is directed to list the grievance referral in File No. 1403-85-M for hearing on its merits.

**2162-86-U; 2280-86-U; 3052-86-U United Steelworkers of America, Complainant
v. Trim Trends Canada Limited, Respondent**

Change in Working Conditions - Unfair Labour Practice - Respondent sold and operations rationalized subsequent to onset of freeze - Elimination of profit sharing plan, implementation of incentive plan and selective treatment of employees - Business justification cannot sanction a breach of the freeze provision - Union's authority undercut - Breach of freeze - Consideration of remedial relief deferred

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *Keith Oleksiuk* for the complainant; *Robert E. Salisbury*, *Donald D. Bush* and *B. Fitzgerald* for the respondent.

DECISION OF THE BOARD; April 30, 1987

1. After the commencement of the hearing into these matters, the complainant requested leave to withdraw its complaint in Board File No. 2280-86-U. Having regard to the stage at which the request was made, that matter is hereby dismissed.

2. The other two proceedings each allege that the respondent Trim Trends Canada Limited violated the "freeze" provisions contained within section 79 of the *Labour Relations Act*. Those matters are hereby consolidated.

3. The parties agreed on all the facts to be presented to the Board and accordingly, no *viva voce* evidence was heard.

4. Some time in 1982, the wage incentive program in effect at the respondent's plant at Dundalk (i.e. the bargaining unit in question) was terminated by the respondent, both because it believed the program was not working and given its economic situation at the time. On September 1, 1982, the respondent decided not to implement an annual wage increase. On September 1, 1983, recognizing that no wage increase had been awarded to employees the previous year, the respondent implemented a 40¢ per hour increase to all employees. The following year, on September 1, 1984, the respondent awarded a 25¢ per hour increase to all employees. On September 1, 1985, the respondent awarded a further 25¢ per hour increase to all employees.

5. On September 6, 1985, the complainant filed an application for certification to represent the employees of the respondent, and the freeze provisions contained within section 79(2) of the Act thereby became effective. On November 15, 1985, subsequent to the onset of the freeze, it was announced that the respondent had been sold to Harvard Industries, Inc. Harvard owned

numerous other manufacturing facilities, all in the United States, including plants in Deckerville and Snover, Michigan, which produce similar products to those at the respondent's plant at Dundalk. Management personnel of the parent company regularly met with employees of the various subsidiary plants, and as part of that process, in July of 1986 representatives of Harvard met with the employees of the respondent at Dundalk.

6. Part of these talks with the respondent's employees included discussion of the employees' wages. At that time Harvard advised employees that because of the freeze provisions contained within section 79 of the Act, it had to consider how to handle any wage increases. After the July meetings, Harvard embarked on a "consultative program" to rationalize the operations of the three plants performing similar work.

7. In a letter, to the Registrar of the Ontario Labour Relations Board dated August 22, 1986, Donald Bush, the Vice-president of Harvard Industries Inc., wrote in part as follows:

"I wish to respectfully notify you that due to business conditions, it is necessary to make certain changes in the wages and working conditions at our Trim Trends plant in Dundalk, Canada.

Over the years, September 1st has customarily been the time for Trim Trends to make company wide adjustments in its wages and working conditions. This year, in order to conform with Harvard Industries fiscal year, adjustments are being made October 1st. Because of this change in timing, we have sent a notice (see attached) to all hourly employees at each of our plants - including Dundalk.

While our Canadian Counsel has familiarized us with paragraph 79 of the Ontario Labour Relations Act, we are of the opinion that business necessity dictates that we take the actions outlined in the attached memo, and that we are not in violation of the spirit of the act [sic].

This action is *not* being taken with the purpose in mind, to in any way place the union in a disadvantageous position. Rather, the adjustments being made are for the sole legitimate business purpose of improving our competitive position in the marketplace."

Employees at the respondent's plant were notified of the proposed changes in a notice posted on August 22nd, 1986, which read as follows:

TO: All Hourly Employees - Dundalk

FROM: Syd Coe

RE: Hourly Wage Adjustments

In past years, throughout Trim Trends, we adjusted our hourly wage rates as of September 1 each year. This year, in order to conform with Harvard Industries accounting fiscal year, our hourly rates, and those of other Trim Trends Plants will be adjusted as of October 1.

I am please to announce the following changes:

- 1) The Trim Trends profit sharing plan is being eliminated, and in its place *an employee incentive plan is being implemented*. This plan is being installed on a plant by plant basis and Dundalk will be next. *The plan should be completed before year end.*
- 2) All hourly wage rates are to be increased .28 effective October 1.
- 3) For those job classifications not covered by the plan, an additional .41 wage adjustment to become effective upon implementation of the incentive plan.

While these adjustments are in keeping with Harvard's plans for Trim Trends, we must all be

aware of the competitive nature of our business and the need to maintain the highest quality and continue to improve our productivity.”

8. As can be seen, the company proposed to grant an annual wage increase, but because of the fiscal year of the parent Harvard and in an attempt by Harvard to rationalize the terms and conditions at the respondent's plant with those plants in Michigan performing similar work, Harvard and the respondent proposed that the annual increase take effect October 1, 1986 rather than September 1, 1986 which would have been the customary date of increase. The company further proposed the elimination of the existing profit sharing plan, and the implementation in incremental fashion of an incentive plan which would cover some of the bargaining unit employees; the granting of a wage increase of 28¢ to all employees (as of October 1, rather than September 1, 1986); and the giving of an additional 41¢ per hour to those employees in the bargaining unit not covered by the incentive plan. A further change to be implemented as of October 1, 1986 was to stagger and lower the starting rates for certain categories of new employees in the bargaining unit.

9. On September 24, 1986, the complainant was certified by the Board to represent the employees covered by the above noted changes. On September 25, 1986, the union wrote to counsel for the respondent indicating its concern with the changes in wages and working conditions at the respondent's plant and noting that such changes would be a clear and direct violation of section 79(2) of the Act.

10. On October 1, 1986, the changes as announced by the company on August 22, 1986 were implemented. The profit sharing plan was terminated, the phased implementation of the incentive plan began, all employees received a 28¢ per hour increase, certain employees received an additional 41¢ an hour while the others became participants in the incentive plan, and the starting rates for certain categories of employees were lowered. On October 3, 1986, the union served notice to bargain on the respondent. At that point, the freeze imposed by section 79(2) was replaced by the freeze contemplated by section 79(1). The Board was advised at the hearing that the parties have been actively negotiating and are currently in the midst of such endeavours.

11. Based on these facts, the complainant submits the respondent has breached the provisions of section 79 of the Act. Section 79 reads as follows:

(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

12. The complainant submits the freeze provisions were violated in five respects by the respondent. First, in the past all wage increases, when awarded, were awarded as of September 1 of the year, but the respondent unilaterally changed the implementation date to October 1st for the 1986 calendar year. Second, when wage increases were awarded, they were always on a uniform "across-the-board" basis, with all employees receiving identical increases. The respondent however has differentiated amongst classes of employees, by giving some participation rights in the incentive plan, and giving others a 41¢ increase in lieu of such participation. Third, the pre-existing profit sharing plan was terminated by the respondent. Fourth, an incentive plan was implemented by the respondent, and on a basis which differentiated amongst employees. The complainant suggests the respondent breached the freeze provisions in this respect both by its decision to implement an incentive plan, and in its further decision to offer participation in that plan only to certain employees. Even if the Board were to find no violation in the implementation of an incentive plan (presumably based on the fact an incentive plan had been in place up to 1982) the complainant argues a freeze violation in the respondent's decision to implement a plan only for certain categories of employees. The plan previously in place had applied across-the-board to all employees. Fifth, the starting rates for certain categories of employees had been lowered.

13. Counsel for the respondent argues that the purpose of section 79 of the Act is to preserve the status quo between parties, to ensure that a union has some sense of security when embarking upon negotiations with an employer. The respondent notes the parties are now five sessions into the negotiating process, and accordingly, the Board ought not to be concerned that the complainant might not feel secure in its position as representative of the employees. No part of the purpose of section 79 was to punish the party which might have breached that section, rather its purpose is to restore parties to their prior positions. In counsel's submissions, in order to consider whether section 79 has been breached, the Board must ask itself whether the bargaining relationship between the parties has been disrupted by the unilateral actions of the employer. If the Board is satisfied such disruption has occurred, the Board then, and only then, should find a breach of section 79 and order the remedy necessary to repair the disrupted relationship. The remedy should not punish the employer, nor should it attempt to second guess the amount, for example, of the wage increases the employer might have awarded had it conducted itself in accord with section 79.

14. In counsel's view, the question the Board must ask itself in the circumstances was what could the employees of the respondent have expected, in the fall of 1986, given that the respondent had been purchased by Harvard which had its own fiscal year and its own historic relationship with employees at other plants. At worst, counsel submitted the respondent had committed a technical violation of the Act, not motivated by any attempt to undercut the union, nor had its actions been taken in knowledge that they might be in breach of the Act. Further, there was no disruption to the bargaining relationship between the parties. In such circumstances, should the Board be satisfied section 79 had been breached by the respondent (which counsel denied), the Board should only issue declaratory relief, and decline to issue any other remedial orders.

15. Finally, counsel for both parties made extensive submissions as to the appropriate reme-

dial orders, if any, that the Board ought to grant in the circumstances. Both counsel agreed it would not be inappropriate, should the Board find a breach of section 79 in the circumstances, to first afford the parties an opportunity to attempt to negotiate remedial relief.

16. A recent discussion of section 79 of the Act and its applicability can be found in *Simpsons Limited*, [1985] OLRB Rep. April 594, where the Board wrote as follows:

"23. That section 79 is intended to maintain the status quo, to provide a period of stability while the parties are establishing their collective bargaining relationship or renewing that relationship by negotiating another collective agreement, is a sentiment often affirmed by the Board. The classic exposition of the parameters imposed on employer conduct during the freeze is the business as before formula in *Spar Aerospace*, *supra*. That formula has been referred to in virtually every case which since has considered section 79. The cases also confirm that section 79 is a strict liability provision in that anti-union animus is not a relevant factor.

24. The interpretation of section 79 in the context of particular fact situations, however, has seldom proven simple or straightforward. The Board in *Simpson*, *supra*, referred to a passage in *Sunnycrest Nursing Home Limited*, [1982] OLRB Rep. Feb. 261 which it is appropriate to repeat here:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

25. And, as stated in *Grey Owen Sound*, *supra*, at paragraph 22:

The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, articulated a business as before rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was to maintain the prior pattern of the employment relationship in its entirety. (See paragraph 19 of the decision). One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management's rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is often very difficult in such situations to ascertain what the pattern of the employment relationship was.

26. Section 79(2) freezes the wage rates, other terms and conditions of employment, rights, duties and privileges of the employees and the rights, privileges and duties of employers for the period specified. Most of the freeze cases have arising in the context described by the above quotation from *Grey Owen Sound*, that is, the transition from unrestricted management rights to a collective bargaining regime, wherein those management rights are limited to a greater or lesser extent. In this context, the cases have discussed on the rights of employer versus the privileges of the employees, in other words, the statute freezes employees' privileges and it is the scope given to the employees' privileges which circumscribes the otherwise unlimited reach of employer rights.

27. Before the transition to a collective bargaining relationship, then, the doctrine of management rights is so broad, so all-embracing that there need be no recourse to employer privileges in the context of section 79(2). Once the transition is complete, however, and the privileges in the context of section 79(2). Once the transition is complete, however, and the freeze arises when the parties are bargaining for a renewal agreement, there may well be found employer privileges. In *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, for example, the Board held that a union had waived certain rights under its collective agreement and could not adopt a different posture during the freeze.

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that

approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace, supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. Business as before is a slippery concept to apply to specific fact situations. The focus of the test is the pattern of operations, the employer's practice. Certainly, where the practice is accurately embodied in an employer's policy manual, the application of business as before has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spara Aerospace, supra*, with respect to annual merit and annual cost of living increases. On the other hand, the increased parking fee cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, September 1984 unreported, File No. 0965-84-U(B). Does business as before require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the actual rate at the time of the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a pattern or business as before to measure employees' privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons, supra*; *Burlington Carpet Mills, supra*; *The Winchester Press, supra*; *Grey Owen Sound, supra*; *Deacon Brothers, supra*; *Airline (Malton) Credit Union, supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound, supra*; *The Winchester Press, supra*; and where the layoffs had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpson, supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia, supra*, for the proposition that the employer may also contract out work for the first time during the freeze.

31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia, supra*; *Scarborough Centenary Hospital, supra*; *Oshawa General Hospital, York Finch Hospital, supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited*, [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one; what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244. The Board considers that the upholding of the right to contract out during the freeze period in *Corporation of the Town of Petrolia, supra*, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see par. 20, in particular).

35. Finally, the lay-off cases are consonant with the reasonable expectations approach. Very few, in any, work forces are entirely static; fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze. The magnitude of the layoffs, of course, must be proportional or relative to the severity of the economic circumstances. Economic justification must be proven where relied on and there must be an absence of anti-union animus. It must also be stressed that, while the expectation of layoffs does not initially depend on the specific history of the employer's operation, there might well be specific evidence with respect to that employer which would negate the otherwise usual reasonable expectation of layoffs in response to an economic downturn.

36. The reasonable expectations approach also distinguishes between layoffs and contracting out. Where there was a pattern of contracting out, of course, there would be no violation of section 79 where work was contracted out during the freeze. However, in the Board's opinion, while an employee would reasonably expect a layoff where there was no demand, i.e., where there was an economic downturn, an employee would not reasonably expect that the work would continue to be performed for the benefit of the employer's operation but through contracting out. This is not to say that the employer does not have the right to contract out work during non-freeze periods, except as limited by a collective agreement. During the freeze, however, and unless there is a practice of contracting out, the employer's right to contract out is limited by the employees' privilege of performing the work if the work is to be performed for the benefit of the employer's operation. Contracting out is merely one of the ways an employer might otherwise increase productivity or efficiency which is caught by the freeze; reducing wages, instituting parking fees, ignoring its policy manual are other means of achieving such goals which are proscribed by the statutory provision."

16. What would the reasonable expectations of the employees in the bargaining unit have been at the time the freeze took effect, with the filing of the application for certification on September 6, 1985. At that point, they had always enjoyed a profit-sharing plan, when wage increases were granted they had always been granted as of September 1 of the calendar year, and all the employees had always been treated uniformly, in the sense they received identical wage increases and all the employees participated in the profit-sharing plan, or the incentive plan when it was in place prior to 1982. Although the respondent announced its intended changes over a month before the date of implementation, those announcements occurred after the commencement of the freeze. Indeed, the freeze was already in place at the time of the sale of the respondent to Harvard.

17. Although the parent company may have had sound business reasons for wanting to rationalize its newly acquired Ontario operation with its existing plants in Michigan and other parts of the United States, section 79 sets the parameters within which it remained free to run the business as it chose. The onset of the freeze imposes on an employer an obligation to conduct its business as it has in the past, in accord with the reasonable expectations of employees, or alternatively, to seek the consent of its bargaining partner, the union, before departing from that pattern. While business justification may provide a defence to allegations of anti-union animus (which are neither made in the instant proceeding, nor relevant to a finding under section 79 of the Act), it cannot sanction a breach of section 79.

18. All prior wage increases had been effective from September 1. The employees had reasonably come to expect (and it therefore became an employee privilege) that if a wage increase was granted by the respondent, it would be effective as of September 1st of the year. Accordingly, we find the respondent breached the Act in not implementing the October wage increases as of September 1, 1986.

19. Prior to the onset of the freeze, employees in the bargaining unit had always been treated uniformly by the respondent (except, of course, that wage rates varied). Whatever wage increases were awarded were given across the board. The profit sharing plan had applied to all employees, and when an incentive plan had been effective it was equally applicable to all employees. When the freeze period began, on September 6, 1985, several months before the sale to Harvard and almost a year before Harvard announced its proposed changes to the wages and benefits of the employees, there was no reason employees ought reasonably to have expected they would not continue to be treated uniformly by their employer. Neither was there reason for employees to expect that the profit sharing plan they had always enjoyed would be terminated. From past experience, in 1982, even during difficult economic times when no wage increase was given, the profit sharing plan remained untouched. How then should employees expect termination of this plan in times when all of them received substantial wage increases?

20. Accordingly, we also find that the respondent breached section 79 in the cancellation of the profit sharing plan.

21. With respect to the implementation of an incentive plan, there had been an incentive plan in place until some time in 1982, at which point the respondent had terminated it. If the question before us were whether employees might reasonably expect, given the previous plan, that an incentive plan might reappear in the work place, we might not find the implementation on October 1, 1986 to be a violation of section 79. However, in the circumstances, we do find the implementation of the incentive plan to have breached section 79. As noted earlier, employees have always been treated uniformly by the respondent, including their common participation in the profit sharing plan and their common participation in the incentive plan that existed until 1982. During the freeze period, the respondent announced and implemented an incentive plan available only to a portion of the bargaining unit. In our view, there was no reason employees could reasonably have anticipated that, absent consent of the union, they were to be treated selectively and differentially, either with respect to the amount of wage increases or with respect to participation in an incentive plan. Accordingly, because the incentive plan implemented by the respondent applied only to certain categories of employees in the bargaining unit, we find that the implementation of that plan violated section 79.

22. With respect to lowering the starting rates of certain categories of employees, again we can see nothing that ought to have led employees to reasonably anticipate starting rates might be lowered for a certain classification, and accordingly we find that this action also constituted a

breach of section 79. Even if we assume the employer had sound business reasons for selectively lowering starting rates (of which we had no evidence) it cannot change rights of employees during the freeze period to be able to enjoy the privileges frozen at the onset of the freeze. There was no history, prior to that onset, of this respondent ever having lowered starting wage rates for certain classifications of employees.

23. We have concluded the respondent has breached section 79 in part on the basis that it sought, for the first time, to selectively treat certain categories of employees, whereas in the past it had never done so nor had employees any reasonable expectation that it might begin to do so. It follows from this analysis, that the respondent also breached section 79 in allowing only some employees participation in the incentive plan, while granting non-participants an additional 41¢ per hour. What the employer was not free to do, and which it attempted to do with sweeping changes to the entire method of calculations of wages and terms and conditions of employment, was to treat employees other than on the uniform basis it had always treated them in the past.

24. The respondent argued there was no disruption to the bargaining relationship and accordingly no violation of section 79. Without commenting on whether an applicant must prove such disruption, we find significant disruption in the circumstances at hand. It will be recalled that the freeze took effect before the sale of the respondent to the parent Harvard. Further, at the time Harvard implemented all the changes, the applicant had already been certified and was entitled to represent employees. The intent of the freeze, after the applicant acquired bargaining rights (as noted in the quote from *Simpsons Limited, supra*), was to provide a period of stability while the parties established their collective bargaining relationship, and to define the parameters under which the transition from unfettered management discretion to co-operative collective bargaining would take place. Quite apart from the intention of the respondent in implementing the changes it did, the effect on employees and on the union would have been obvious. The bargaining authority of the union and its ability to effectively represent employees and to have their support as it embarked upon its first collective bargaining endeavour for them, would have been severely undercut by the respondent's actions in cancelling a profit sharing plan, lowering the starting rates for employees, selectively treating employees when it had never done so in the past, and changing the annual increase date by delaying it one month. In the face of such actions it is praiseworthy that the parties were still able to sit down and begin to negotiate. Their ability and willingness to do so cannot, however, change the disruption to the bargaining relationship and the undercutting of the union's strength and authority occasioned by the unilaterally imposed actions of the respondent.

25. With respect to the particular remedial orders that ought to issue, the parties are currently engaged in negotiations and both parties felt it not inappropriate, should a breach be found, to first afford them an opportunity to attempt to work out any remedial relief. Accordingly, we will defer our consideration of the appropriate remedial relief to afford the parties an opportunity to resolve the matter. We remain seized with respect to remedial relief, including the question of whether a posting is warranted.

26. By way of guidance to the parties in this respect, should the Board ultimately deal with this matter we will be guided by the principle that the parties ought to be placed in the position they would have been had section 79 not been breached. In concrete terms, the respondent made the decision it could afford to give increases, as of October 1, 1986 of 28¢ per employee to all employees, together with participation in an incentive plan or 41¢ per hour for those not participating. At the same time, the respondent would have taken into account in reaching those figures the potential costs of the incentive plan, and the potential savings due to the cancellation of the profit sharing plan and the lowering of certain starting rates. Before the Board will be able to decide the

appropriate remedial relief, it would have to quantify the costs incurred or anticipated with respect to factors such as these.

1201-84-JD United Brotherhood of Carpenters and Joiners of America, Local 1190, Complainant v. Labourer's International Union of North America, Local 183; Lakeview Estates Ltd.; and 529126 Ontario Inc. carrying on business as **Trimar Construction**, Respondents v. Toronto Housing Labour Bureau, Intervener

Construction Industry - Jurisdictional Dispute - Work assignment dispute involving representation issue as to whether carpenters' or labourers' union will represent carpenters engaged in house framing carpentry in low-rise residential construction - Board exercising its discretion to hear jurisdictional dispute despite fact that representation issue involved - Representation issue merely going to merits of work assignment dispute and to the form of remedy

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *David A. McKee* for the complainant; *C. M. Mitchell*, *L. A. Richmond* and *M. Reilly* for Labourer's International Union of North America, Local 183; *M. G. Horan* for Lakeview Estates Ltd.; *Bruce Binning* and *Gordon Lavis* for the intervener.

DECISION OF THE BOARD; April 13, 1987

1. The Board directs that the Toronto Housing Labour Bureau ("the Bureau") be and it is hereby made an intervener in these proceedings.
2. This is a complaint made under section 91 of the *Labour Relations Act* in which the complainant, United Brotherhood of Carpenters and Joiners of America, Local 1190 ("the Carpenters"), is requesting the Board to issue a direction with respect to certain work being performed by carpenters employed by 529126 Ontario Inc., c.o.b. as Trimar Construction ("Trimar") under subcontract from the respondent Lakeview Estates Limited ("Lakeview"). The complaint was filed by the Carpenters as a result of a grievance referred under section 124 of the *Labour Relations Act* by the Labourers alleging that Lakeview was bound to a collective agreement between the Labourers and the Bureau and had violated the subcontracting provisions of the agreement when it let a subcontract for house framing to a subcontractor not in a collective bargaining relationship with the Labourers. The referral named Trimar as a party which might be affected by it.
3. The Carpenters appeared at the hearing scheduled for the referral claiming that they held bargaining rights for Trimar's employees and that Trimar was the contractor complained of in the referral. The Carpenters sought status at the hearing for the sole purpose of raising the claim that the grievance was really a jurisdictional dispute. They were given status for this limited purpose and were successful in establishing a *prima facie* case that the grievance involved a dispute over the assignment of work. Accordingly, the hearing into the grievance was adjourned in order to permit the Carpenters a specific period of time in which to file a complaint under section 91 of the Act. This complaint was duly filed.

4. When the complaint came before the Board for hearing, counsel for the Labourers took the position that the Board should not entertain the complaint for two reasons. First, because it lacked jurisdiction under subsection 1 of section 91 to entertain it. Second, in the alternative, if the Board found that it did have jurisdiction to entertain the complaint, it should decline to do so. The Labourers' reasons for contending that the Board should refuse to entertain the complaint were two-fold. The first reason was because the complaint was an abuse of the Board's process. The second reason was because, according to the Labourers, the underlying dispute was not one over work jurisdiction, but was a dispute between the Carpenters and Labourers as to which one of them was going to represent carpenters and their apprentices in residential house framing carpentry. In other words, the dispute was really one over bargaining rights for carpenters and carpenters' apprentices in part of the residential sector of the construction industry and not over the assignment of that kind of work to one trade union or another. Counsel for the Bureau supported the position of the Labourers generally, but took the position that there was no need for the Board to concern itself with the question of whether it had jurisdiction in the first instance to entertain the complaint because the underlying issues were so patently of a representational nature rather than a work jurisdictional nature that, even if the Board had jurisdiction under subsection 1 of section 91, it should refuse to entertain the complaint.

5. The Board adjourned the issue of its jurisdiction under section 91(1) of the Act because of the non-attendance of a witness duly summonsed by the Carpenters whose evidence would be relevant and probative to that issue. The Board heard the full submissions of the parties on the exercise of its discretion whether to entertain the complaint and reserved its decision.

6. The factual context in which the complaint has arisen is undisputed. The Carpenters and Labourers began campaigns to organize employees doing framing carpentry in house construction in the Board's geographic area #8 in or about June, 1981. During the remainder of the year, the Board issued approximately 70 certificates to the two unions for bargaining units either of carpenters and carpenters' apprentices or construction labourers, carpenters and carpenters' apprentices in Board area #8. They each received about the same number of certificates. In about 15 cases, there were concurrent applications for certification by each union, so there was an obvious overlap in their campaigns. Six of the overlapping applications for certification resulted in prolonged litigation before the Board continuing until the end of October, 1983. The litigation involved charges by the Labourers of employer support for the Carpenters. The Carpenters eventually withdrew their applications for certification and the Labourers did not pursue the charges further. The Labourers ultimately were certified as bargaining agent for employees of five of the employers. One of these was a company called Montemar Construction Limited ("Montemar").

7. While that litigation was proceeding before the Board, both unions filed unfair labour practice complaints against each other and other parties. The Labourers filed a complaint in May 1983 which was an attack on all of the bargaining rights asserted by the Carpenters in house framing carpentry. The Ontario Carpentry Contractors Association and many of its contractor members whom the Association purports to represent, and for whose employees the Carpenters claim to be the exclusive bargaining agent, also were named as respondents. The Carpenters filed a complaint in June 1983 against the Labourers and the Bureau alleging that the Labourers had signed a document with the Bureau which purported to be a collective agreement covering carpenters and carpenters' apprentices despite the fact that the members of the Bureau were home builders, in other words developers, who did not employ carpenters. The complaint also alleged that the Labourers and the Bureau had executed the document during the course of a lawful strike by the Carpenters and had included in the document a subcontracting provision, the effect of which was to freeze out the contractors whose employees were represented by the Carpenters.

8. At about the same time as the Carpenters' complaint was filed, the Labourers filed five complaints against the Carpenters and various of their representatives and agents alleging that the strike in which the Carpenters were engaging was a strike promoted by the employers, was unlawful and was an attempt to frustrate the Labourers' bargaining rights.

9. All of the foregoing complaints were adjourned *sine die* before the calling of evidence was completed, with the consent of the parties.

10. Five days after the Labourers had filed the grievance referral against Lakeview, they filed an application under section 1(4) of the Act seeking to have Montemar and Trimar declared to be one employer for purposes of the Act. Before that application came on for hearing before the Board, the Labourers filed a new complaint under section 89 of the Act alleging many of the same facts as had been the subject matter of the charges in the litigation in the six overlapping applications for certification as well as some of the adjourned section 89 complaints. The section 1(4) application and the new section 89 complaint were listed for hearing together and first came on for hearing before a different panel of the Board on the day before the hearing of the instant complaint. The Carpenters sought to intervene in the section 1(4) application on the grounds of the bargaining rights they were asserting on behalf of the employees of Trimar. The Labourers contested the Carpenters' claim on the grounds that the agreement had been obtained with employer support. The Labourers base that claim on the same facts alleged in their new section 89 complaint which, as noted above, are a revival of the charges filed by the Labourers, but not decided, in the six competing applications for certification.

11. The facts alleged in the Labourers' adjourned unfair labour practice complaints, the section 1(4) application and the new section 89 complaint and the facts alleged in the Carpenters' adjourned unfair labour practice complaints and its jurisdictional complaint herein are similarly worded attacks on the bargaining rights asserted by each union and on their alleged collective agreements with the respective employer associations which are parties to those agreements.

12. Schedule "B" to the complaint herein requests the following relief:

"1. An Order requiring Trimar Construction to continue to assign the work to members of the Complainant.

2. A Declaration that the purported Collective Agreement between Lakeview and Local 183 is null and void.

3. In the alternative, a Declaration that the sub-contracting clauses in the said purported Collective Agreement are null and void and of no force and effect.

4. An Order requiring Local 183 to cease and desist from requiring Lakeview or any other contractor of Lakeview not in contractual relations with Local 183 to assign work to members of Local 183."

13. Counsel for the Labourers and the Bureau made separate submissions on the question of whether the Board should refuse to entertain the complaint, but the thrust of their arguments was the same or similar and generally they endorsed each other's submissions.

14. With respect to the claim that the complaint really involves the fight between the Labourers and the Carpenters over who will represent carpenters in house framing rather than a dispute over what group of employees will do the work, Local 183 and the Bureau point to all of the litigation referred to above as demonstrating a hotly contested campaign between the two trade unions to gain bargaining rights for carpenters and carpenters' apprentices employed by contractors engaged in house framing carpentry in low-rise residential construction. Those two parties

submit further that three of the four items of relief sought by the Carpenters, being items 2, 3 and 4 of Schedule 'B' quoted above, demonstrate that even the complainant sees the complaint as representational in nature. The Labourers and the Bureau argue, in these circumstances, that the Board should not entertain a jurisdictional complaint within a single trade, in this case house framing carpentry, where one group of employees supports one trade union and another group supports a different trade union. The example of the cement masons' trade was cited. The Operative Plasterers and Cement Masons International Association of the United States and Canada and the Labourers' International Union of North America have competed for many years to represent the employees in the trade. It is argued that the Board would not entertain a complaint over a dispute about which one of those trades was to be assigned the work of cement masons. That is because, in part at least, section 91 of the Act was not intended to deal with disputes over which trade union was going to represent an entire trade or a major segment of an entire trade. Rather, it is argued, section 91 is intended to deal with the more peripheral overlaps in the work jurisdictions claimed by two or more trades.

15. With respect to the contention that the complaint is an abuse of the Board's process, it is argued that the Carpenters are seeking to use the section 91 process to do what, so far, they have been unable to do by their unfair labour practice complaints filed under section 89 of the Act. In other words, the Carpenters are seeking to use the processes of the Act designed to resolve disputes over work assignments for the purpose of striking down the collective agreement between the Labourers and the Bureau and avoiding the Labourers' challenge of the collective agreement between the Carpenters and Trimar which is part of the section 1(4) application still before another panel of the Board. The Labourers and the Carpenters contend that the proper forum for dealing with those issues are the sections of the Act under which the issues were first raised and not section 91, particularly when other panels of the Board are already seized with those issues. Seeking to use section 91 for those purposes is alone an abuse of the Board's processes, but further abuse would result from the disrespect which would be caused for the section 91 process by allowing it to be used for purposes other than the resolution of work assignment disputes. It is argued that this is because of concern in the construction industry for the length and cost of proceedings under that section.

16. Counsel for the Labourers cited as examples of the Board having exercised its discretion under section 91(1) to refuse to entertain complaints, the following Board decisions: *F. A. Acton*, [1969] OLRB Rep. Feb. 1216; *Omega Marble Company Ltd.*, [1970] OLRB Rep. May 231; and, *Comstock International Limited*, [1982] OLRB Rep. June 854. Labourers' counsel also relies on the Board's decision in *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247 for the proposition that section 91 does not give the Board discretion to hear every complaint which might involve a competition between two trade unions for employees in the same trade. Finally, counsel for the Labourers and the Bureau rely on the Board's decision in *Simcoe Mechanical Contracting Limited*, [1982] OLRB Rep. Sept. 1352 for the proposition that section 91 cannot be used as a substitute for those sections of the Act which specifically deal with representation issues when the dispute underlying the complaint is really a dispute between two trade unions as to which one will represent the employees in a particular trade. The view of that decision taken by counsel for the Labourers is that the Board, having found that the dispute was really a contest between the two trade union parties to it over which of them would represent pipefitters in collective bargaining in Ontario, and not a test of whether the members of one trade union were better equipped than the members of the other one to do the work in question, declined to make a jurisdictional order. Counsel for the Bureau argues that a fair reading of the decision leads to the inescapable conclusion that the Board, if faced with a fresh complaint involving the same parties, would refuse to entertain it because the dispute involved what is inherently a representation issue; that is, the dispute deals with a complete overlap of one trade union's work jurisdiction claim with that of the other.

17. There is no doubt that the Board has exercised its discretion under section 91(1) in a variety of situations, to decline to entertain complaints made under section 91 of the Act. Apart from *Simcoe Mechanical, supra*, the decisions on which the Labourers and the Bureau rely are so readily distinguishable on their facts that they are of little assistance to the Board in the instant case, except as support for the general proposition that the Board has declined to entertain complaints under section 91 of the Act even where it has jurisdiction to entertain them. The Board's decision in *Napev Construction, supra*, did involve two trade union parties, both of which are bargaining agents for bricklayers in the construction industry. The Board was not deciding in that case, however, whether to exercise its discretion. Rather it was deciding whether it had jurisdiction at all under section 91(1) of the Act. It found that it did not have jurisdiction because there had been no demand that the work be assigned to the members of one trade union instead of to the members of the other. While the Board did note in the course of deciding the case "...that each trade union is centrally based on the same trade skills which is unlike the more conventional nature of jurisdictional conflict.", it would not be reasonable to conclude from the decision that the Board would have exercised its discretion not to entertain the complaint had it found the jurisdiction to do so.

18. The dispute in the Board's decision in *Simcoe Mechanical, supra*, involved a claim by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 ("Local 46") for certain plumbing and pipefitting work which the employer, Simcoe Mechanical, had assigned to its employees who were members of the Christian Labour Association of Canada ("the C.L.A.C."). In the course of deciding the complaint on its merits, the Board stated in part as follows at paragraphs 31 and 32:

31. In many respects this complaint is not a typical complaint under section 91. In this complaint the Board is dealing with competing claims for the work in dispute based not upon a trade or test of useful skill, but rather on the basis of union membership. The employees of Simcoe have elected the C.L.A.C. more than a decade ago as their bargaining agent, and have on two occasions rejected an attempt by the locals of the United Association to displace the C.L.A.C. as their bargaining agent in secret ballots conducted by the Board....

32. As the Board noted earlier, this complaint is not a typical complaint under section 91 of the Act. Certainly there are two trade unions which earnestly seek the work in dispute. However, the work in dispute falls squarely within the trades of plumbing and pipefitting, and is most certainly not marginal and not peripheral to those trades. The essential question of the skills involved underlines the fact that this complaint is essentially representational in nature rather than jurisdictional....

Because of that aspect of the complaint, the Board was not prepared to give paramount weight to "area practice", one of several criteria which the Board takes into account in work assignment disputes in the construction industry, because the area practice criterion would so overwhelmingly support Local 46's claim that it would likely lead to the C.L.A.C. members losing plumbing and pipefitting work throughout Ontario. After assessing all of the criteria and giving limited weight to area practice, the Board found that the criteria favoured an assignment of the work in dispute to members of the C.L.A.C. Therefore, "...having regard to its view of the underlying nature of this proceeding before the Board,...", it directed that Simcoe Mechanical should continue to assign the disputed work to members of the C.L.A.C.

19. Before that complaint got to a hearing on its merits, a different panel of the Board had to decide a dispute over the Board's jurisdiction under section 91(1) of the Act to hear the complaint. See the Board's decision in *Simcoe Mechanical Contracting Limited*, [1981] OLRB Rep. July 1004. Counsel for Simcoe Mechanical had urged the Board "...to characterize the dispute between [the] two trade unions in this case as a representation dispute, and thus, decline to deal

with it as a dispute concerning work assignment under section 81 [now section 91].” Counsel for the C.L.A.C. adopted the same position and argued further that section 91 ought not to be used to alter bargaining rights. The argument is described at paragraph 4 of the decision in the following terms:

...He thus argued that the overall scheme of *The Labour Relations Act* deals substantially with representation issues and that section 81 [now section 91] ought to be interpreted in that context, thus, where bargaining rights might be altered the Board does not have the jurisdiction to deal with that under section 81 [now section 91] of the Act. In short, if Local 46 of the Plumbers wants to displace CLAC they ought not to be able to do it under the guise of section 81 [now section 91] but should use the certification mechanism set out in the Act.

The Board found at paragraph 8 that it had jurisdiction to hear the complaint stating:

At the conclusion of the hearing on this preliminary point, the Board by an oral decision, found that the Board had jurisdiction under section 81(1) [now section 91(1)] to entertain the present complaint. Simply put, the arguments of both the respondents concerning the representational rather than the jurisdictional nature of the present case are arguments which go to the merits [sic] of the case. Whether or not the Board decides to give a remedy which overrides existing representational rights is a matter for the panel hearing the merits of the present case....

The Board made this further conclusion about the representational nature of the complaint at paragraph 9:

We now turn to the other argument of the respondents, that the present complaint is a representation complaint rather than a jurisdictional dispute, and that section 81 [now section 91] should not be given so broad an interpretation as to render meaningless those sections of *The Labour Relations Act* relating to certification proceedings. We are of the view that these arguments go to the merits of the dispute and to the form of remedy which the Board might grant the complainant. They do not, however, go to the preliminary issue of whether the Board has the statutory power to entertain such a complaint as filed by the complainant in the present case. In this regard, we are compelled to note that section 81 [now section 91] must give the Board broad powers to entertain such complaints in order to be effective as an alternative to jurisdictional work stoppages.

20. Since there will be need for further reference to both *Simcoe Mechanical* decisions, for ease of reference, *Simcoe Mechanical Contracting Limited*, [1981] OLRB Rep. July 1004, will be referred to as *Simcoe Mechanical No. 1* and *Simcoe Mechanical Contracting Limited*, [1982] OLRB Rep. Sept. 1352, will be referred to as *Simcoe Mechanical No. 2*.

21. There is little room for doubt that a contest existed between the Labourers and the Carpenters over which of them would represent house framing carpenters at the time this complaint was made. Elements of that contest clearly have been drawn into the complaint by some of the relief sought by the Carpenters. But are these circumstances reason for the Board to exercise its discretion so as to refuse to hear the complaint? The Board thinks not.

22. The Board's discretion whether to entertain complaints over disputed work assignments comes from section 91 which provides:

The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any

officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

Once the preconditions have been satisfied for bringing a complaint within the purview of subsection 1, and subject to subsection 14, the Board has apparently unfettered discretion respecting both whether it will inquire into the complaint in the first instance, and if it does, the scope of its inquiry. Subsection 1 deals, amongst other things, with disputes between trade unions about whether the members of one trade union or another will perform a particular kind of work. The remaining subsections deal with how the Board is to apply and enforce its general powers in subsection 1.

23. The Board was given the statutory jurisdiction for dealing with work assignment disputes in 1966, and in 1970 subsection 1 was amended to give the Board jurisdiction in circumstances where an employer employed only one of the disputing groups of employees. One significant effect of the change has been to enable the Board to entertain work assignment disputes in circumstances where the employer assigning the work is a "single-trade" employer. That is, an employer who normally employs persons in one trade or craft. This would include many specialty contractors in the construction industry who normally get most of their work by taking sub-contracts from a general or prime contractor on a project. Prior to the amendment, the Board was limited to entertaining complaints to those situations where the employer making the disputed assignment employed members of the disputing unions, trades, crafts or classes. This limitation arose from a judgement of the Supreme Court of Ontario in *R. v. Orliffe, ex.p. Can. Pittsburgh Industries Ltd.*, (1961) O.W.N. 223, 61 CLLC ¶15,373 (Ont. H.C.). The limitation meant that only a general or prime contractor on a construction project was likely to be subject to what is now section 91(1), and then only when the disputed work was being performed by his own forces. Since these contractors frequently subcontracted work to single-trade, specialty contractors, if the specialty contractors employed different trades for the work than the general or prime contractors would have used, the seeds of potential work jurisdiction disputes were sewn. Since such disputes were beyond the reach of section 91 when they did erupt, it was not unusual for the trade unions which did not get the work to resort to unlawful actions to regain it. The expanded jurisdiction made it possible for the Board to deal with jurisdictional disputes arising out of the subcontracting of work. It is generally accepted that the object of this expansion of jurisdiction was to make section 91 an effective alternative to work stoppages as a means of "resolving" work assignment disputes. That, too, has guided the Board in its interpretation and application of the section, particularly subsection 1. See, for example, the final sentence of paragraph 9 quoted above from *Simcoe Mechanical No. 1*.

24. Section 91 is set in a statutory framework which does not give any trade union a monopoly to represent particular kinds of employees or employees doing a particular kind of work (see, *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734), although the Province-Wide Bargaining part of the Act does impose some limitations on employees' choices of the type of trade union which can represent them in the industrial, commercial and institutional sector of the construction industry. But for that kind of statutory framework, it is unlikely that the Labourers could have been in a position in 1981 to become the exclusive bargaining agent for bargaining units of carpenters. For purposes of clarity and as the Act now stands, it should be noted that the Labourers, being an affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act, cannot lawfully represent in collective bargaining in the industrial, commercial and institutional sector of the construction industry employees in trades other than construction labourer. Nor can any other trade union which is an affiliated bargaining agent lawfully represent in collective bargaining in the industrial, commercial and institutional sector of the construction industry, employees in any trade other than its own. The fact that the Act does not grant a monopoly to particular trade unions to represent employees who perform a particular kind of work explains why the

Labourers or the Operative Plasterers can be bargaining agent for employees engaged in cement finishing, whether they are described as labourers or cement finishers. It also explains why there could be two unions representing pipefitters in *Simcoe Mechanical No. 2*, *supra*, and two unions representing bricklayers in *Napev Construction*, *supra*. It should not be surprising then, that from time to time, representational contests will be at the root of, or a significant element in, a work assignment dispute.

25. Such was the case in the *Simcoe Mechanical* decisions. Furthermore, from time to time, Board decisions have acknowledged that there is a jurisdictional dispute element to a representation application. Typically, in the construction industry, the Board sees this occurring when a trade union applies for certification for its trade and another trade union intervenes in the application claiming that it already represents, under a collective agreement, the employees of the employer who are the subject of the application. Such interventions are founded frequently on a claim that the work being performed by the employees on the making of the application is work of the intervener's trade covered by its collective agreement with the employer. Therefore, while these interventions, by their very nature, are claims that the intervener holds bargaining rights for the employees in question, they are founded, in part at least, on claims of jurisdiction over the work. In applications for certification, these issues are not settled on the basis of which union has the better claim to do the work (which is the usual result of a section 91 determination on the merits), rather they are resolved on the basis of whether the applicant trade union can establish by evidence that members of its trade have performed the work sufficiently for the Board to find it is work coming within its trade, even though it may be work claimed by the intervener. Subsections 15 and 18 seem to give some recognition to this inter-relationship between representation rights and work jurisdiction claims. These sections give the Board the power to alter bargaining unit descriptions where conflicting descriptions are found in certificates issued by the Board or in collective agreements. Within that sort of legislative framework, then, the mere existence of a representation contest should not be reason alone for the Board to refuse to entertain a section 91 complaint.

26. While the Board in *Simcoe Mechanical No. 1* was dealing with an issue of its primary jurisdiction under section 91(1) and not the exercise of its discretion, it clearly repudiated the argument that the alleged representational character of the dispute was a matter to be dealt with under those sections of the act designed for representation issues to the exclusion of section 91. That stance, in our view, is consistent with how the Board resolves competing representation claims in an application for certification when one of the claims is founded on an assertion of jurisdiction over the work being performed on the date of making of the application (see paragraph 25 above). The Board, in the *Simcoe Mechanical* case, saw the issue as one going to the merits of the complaint and to the form of remedy which might be granted and *not* to the preliminary issue of the Board's jurisdiction. In coming to that conclusion, the Board took account of its broad powers under section 91 to entertain such complaints and the need for those powers to make section 91 "...effective as an alternative to jurisdictional work stoppages.". While it does not seem from the decision that the question of the Board's discretion under section 91(1) was argued in that case, the Board herein thinks that the reasoning in *Simcoe Mechanical No. 1* is equally applicable to the exercise of the Board's discretion. We think that reasoning tips the scales in favour of the Board entertaining the complaint, assuming it has jurisdiction under section 91(1), and dealing with the "representation issue" as going to the merits of the work assignment dispute and to the form of remedy. For the Board to refuse access to section 91 because the two trade union parties to the complaint are engaged in a representation contest would be inconsistent with a statutory scheme which does not give a monopoly to any trade union to represent a particular kind of work and which provides, as an alternative to jurisdictional work stoppages, a mechanism for resolving work assignment disputes between trade unions. In that kind of statutory framework, it seems to the Board that it makes no material difference whether the work assignment dispute arises over work

falling wholly within a single trade represented by two or more competing trade unions, or over work within an overlap at the periphery of the work jurisdictions claimed by two or more different trades.

27. The Board does not think that the decision in *Simcoe Mechanical No. 2* suggests the contrary. If counsel for the Labourers, when he stated that the Board “declined to make a jurisdictional order”, meant the Board did not make an order that would have given either the C.L.A.C. or Local 46, as between those two unions, jurisdiction throughout the Board’s geographic area #8, we agree. What clearly it did, however, was take into account the representational character of the dispute when it weighed the criteria normally considered by the Board in deciding work assignment disputes and in the type of order it made. Having found that the criteria favoured continuation of the work assignment to the employer’s employees represented by the C.L.A.C., the Board directed that the assignment be maintained on that project. Thus, the representational element of the dispute did, in the words of *Simcoe Mechanical No. 1*, “...go to the merits of the dispute and the form of remedy which the Board might grant....”.

28. For the foregoing reasons, the Board does not find the representational aspect of this complaint sufficient cause to refuse to entertain the complaint.

29. That leaves the issue of whether the Board should refuse to entertain the complaint because it is an abuse of the Board’s process. For the following reasons, the Board thinks that this issue also is more appropriately dealt with in the course of hearing the complaint on its merits. On the evidence before the Board, it seems like each union has foregone no opportunity to launch attacks on the bargaining rights of the other in the hopes of extinguishing those rights. Until their respective rights are terminated by some legitimate process, they are entitled to seek to protect those rights by the various processes open to them under the Act. Sometimes that gives them a choice as to the section of the Act to invoke. This does not mean that they can keep raising the same allegations which they have raised before, but, for their own reasons, have not pursued to final determination when they have had the opportunity to do so. That kind of conduct is something which a hearing panel can deal with in deciding whether, in the first instance, evidence on such allegations should be admitted and, if it is, the conditions under which it will be admitted. For example, if the instant complaint is heard on its merits, the hearing panel might decide to limit evidence on each union’s collective agreement to proof that they are collective agreements as defined by section 1(1)(e) of the Act. On the other hand, if the panel decided it had to know more about how those agreements came into being, it might choose to hear evidence on some of the old charges and counter-charges.

30. This complaint has its origin in the Labourers’ grievance referral under section 124 of the Act. That grievance alleged that Lakeview had contravened the subcontracting terms of the agreement between the Bureau and the Labourers. The grievance, *prima facie*, is a legitimate attempt to protect the security of the Labourers’ bargaining rights and the work opportunities of their members. The Board has found collective agreement limitations on subcontracting for those purposes to be legitimate. The Carpenters, in turn, have seen the grievance as a threat to their own claim over the work involved for the benefit of their members. They have chosen to move under section 91 to protect their claim. Their complaint, *prima facie*, is also a legitimate attempt to preserve their own claim to framing carpentry work. By the nature of the arbitration process, the Carpenters cannot be a party to the grievance referral, so their claim to rights respecting framing carpentry could not be heard in proceedings under section 124 of the Act. Nor can Trimar, the contractor alleged to be performing the disputed work, be a party to those proceedings and have its interests heard. The section 91 process accommodates all parties whom the Board finds to have an interest, even though the interest may not be a direct legal one. The Board does not think it

would be appropriate to deny the Carpenters access to that process on the preliminary motion that some of the facts alleged in the complaint and some of the relief sought may be grounds for finding an abuse of process. In the Board's view, that question is better decided, if necessary, in the course of deciding the complaint on its merits or in framing the form of relief to be granted.

31. The Board is constrained to observe, however, that it may be difficult in the circumstances of this case for either the Carpenters or the Labourers to demonstrate that their members are entitled as of right to perform the work in dispute. Or, to put it another way, the relevant facts may demonstrate that the members of either union can perform the work. While such a result might seem to foretell a result similar to that in *Simcoe Mechanical No. 2, supra*, that or any other conclusion must be based on an assessment of the merits after weighing the criteria relevant to the determination of work assignment disputes.

32. In all of the circumstances of this complaint and for the foregoing reasons, the Board will not exercise its discretion under subsection 1 of section 91 to refuse to entertain this complaint. In the result, the Registrar is directed to relist the complaint for hearing before a panel of the Board. The purpose of the hearing is to receive the evidence and representations of the parties on whether the Board has jurisdiction under section 91(1) of the Act to entertain the complaint, and, if it does, the hearing will continue as a pre-hearing conference pursuant to Practice Note #15 of the Rules of Procedure, Regulations and Practice Notes under the Act.

2943-86-U Ontario Public Service Employees Union and its Local 565, Complainant v. York-Finch General Hospital, Respondent

Abandonment - Bargaining Rights - Bargaining unit description in collective agreement making no provision for the exclusion of part-time employees but provisions of collective agreement never applied to part-time employees - Union found to have abandoned its bargaining rights for part-time employees

BEFORE: Ken Petryshen, Vice-Chair, and Board Members D. A. MacDonald and R. R. Montague.

APPEARANCES: James Hayes, Martin Sarra and Mohamed S. Sabounji for the complainant; C. G. Riggs, M. L. Tims, A. Waldron, G. Bell and A. Schiavello for the respondent.

DECISION OF THE BOARD; April 22, 1987

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* alleging contraventions of sections 15, 66 and 43 of the Act.

2. After entertaining the facts and the parties' submissions, and after recessing to consider the matter, the Board made the following oral ruling at the hearing on April 13, 1987:

The parties agreed that this complaint raised a fairly narrow issue for the Board to decide. That issue is whether or not the complainant abandoned its bargaining rights for part-time employees. We note that, although both counsel used the term part-time, neither counsel defined the term with any

precision. We are satisfied that the complainant union has abandoned its bargaining rights for part-time employees. Accordingly, the Board declares that the Ontario Public Service Employees Union and its Local 565 abandoned bargaining rights for those part-time employees which they contend are covered by the current collective agreement with the respondent.

The factual context and reasons for the above ruling are as follows.

3. The relevant facts were introduced on the agreement of the parties. In 1974, the Board certified the Civil Service Association of Ontario (Inc.), of which the complainant is a successor union, for a bargaining unit of the respondent's employees described as follows:

"all medical laboratory technologists, laboratory assistants, radiology technologists, respiratory technologists, nuclear medicine technologists, electroencephalograph technologists and electrocardiogram technicians employed by the respondent in Metropolitan Toronto save and except Administrative Charge Technologists, persons above the rank of Administrative Charge Technologists, members of the medical and nursing profession, office, clerical, service and other technical staff, students in training and students employed during the school vacation period".

4. For our purposes, the recognition clause in the most recent collective agreement, as well as in the other collective agreements negotiated since certification, are virtually identical to the bargaining unit description contained in the 1974 certificate. It is agreed that these bargaining unit descriptions make no provision for the exclusion of part-time employees. The formal documents, then, namely the certificate and the successive collective agreements, include part-time employees within their scope. However, the provisions of the collective agreement have never applied to part-time employees. The respondent, with the knowledge of the complainant, has never deducted union dues for part-time employees, nor have any other articles of the collective agreement, such as the seniority clause, the grievance procedure provision, and the health and welfare clauses been applied to part-time employees. The collective agreement specifically notes that the salary schedule applies to full-time employees. This situation has existed from the negotiation of the first collective agreement to the present.

5. The material before us indicates that at least as early as 1977, representatives of the complainant were aware of the fact that the collective agreement was not being applied to part-time employees. During the negotiation of local issues at that time, the complainant proposed that "permanent part-time personnel" be added to the recognition clause. The respondent did not accept this proposal and it was eventually dropped by the complainant. From 1977 to the present, the material before us reveals that the complainant recognized that the collective agreement was not being applied to part-time employees. At various times, the complainant proposed that the respondent amend the collective agreement to include part-time employees, but without any success. In the most recent set of negotiations, Mr. Sarra, on behalf of the complainant, unsuccessfully attempted to obtain the respondent's agreement to apply the terms of the collective agreement to part-time employees. Until this complaint was filed, the complainant or its predecessor had not taken any steps to enforce any rights they may have had relating to part-time employees.

6. In its reply to the complaint and before us, counsel for the respondent took the position that the complainant had abandoned any bargaining rights it may have had for the part-time employees. The parties agreed that the complaint raised this point as the central issue and argued the case accordingly.

7. The Board has recognized the concept of abandonment for many years. The Board's comments in *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110, at pg. 111, relating to the concept of abandonment, are worth noting:

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them...

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

8. On the facts before us, we are satisfied that the complainant abandoned its bargaining rights for the part-time employees that appear to be included in its bargaining unit. There is no evidence before us which indicates the complainant or its predecessor ever asserted bargaining rights on behalf of the part-time employees. At least as early as 1977, representatives of the complainant became aware of the fact that the respondent considered the part-time employees beyond the scope of the collective agreements. The complainant's efforts over the years to amend the recognition clause to include part-time employees within its scope indicate that representatives of the complainant recognized that any bargaining rights they may have had for part-time employees were lost. At no time did the complainant challenge the respondent's position by means of a grievance. Although we were not referred to any cases in which it was found that a bargaining agent abandoned only a part of its bargaining rights, we are satisfied that such a finding is appropriate in the circumstances of this case. The Board hereby confirms its oral ruling.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1786-86-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Cambridge Canadian Foods Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (36 employees in unit) (*Having regard to the agreement of the parties*)

2012-86-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. A. C. & I. Services Ltd. (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (27 employees in unit)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (27 employees in unit)

2208-86-R: Ontario Nurses' Association (Applicant) v. Georgetown & District Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Georgetown, Ontario, save and except head nurses, persons above the rank of head nurse, persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1986" (43 employees in unit)

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than 24 hours per week by the respondent at Georgetown, Ontario, save and except head nurses and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1986" (13 employees in unit)

2209-86-R: Ontario Nurses' Association (Applicant) v. Porcupine General Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at South Porcupine, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (20 employees in unit)

Unit #2: "all registered and graduate nurses regularly employed by the respondent in a nursing capacity at South Porcupine for not more than 24 hours per week, save and except supervisors, and persons above the rank of supervisor" (13 employees in unit)

2340-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. R. W. Kangas Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Sawmill in the Township of Ignace, save and except foremen, persons above the rank of foreman, sales, office and clerical staff, kitchen staff, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2371-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Hearn Stratton Construction Ltd., Appleton Construction and 663732 Ontario Limited (Respondents)

Unit #1: "all carpenters and carpenters' apprentices in the employ of 663732 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of 663732 Ontario Limited in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

2441-86-R: United Food & Commercial Workers International Union (Applicant) v. Skaf's Bros. Foods Limited (Respondent)

Unit #1: "all employees of the respondent in its retail stores in Thunder Bay, save and except meat managers, senior assistant store managers and persons above the rank of meat manager and senior assistant store manager, office and clerical staff employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (92 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in its retail stores in Thunder Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except meat managers, senior assistant store managers, and persons above the rank of meat manager and senior assistant store manager, and office and clerical staff" (36 employees in unit) (*Having regard to the agreement of the parties*)

2750-86-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. 359087 Ontario Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Cobourg Motor Inn Division in Cobourg, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*)

2806-86-R: Canadian Paperworkers Union (Applicant) v. W.H. Smith Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and senior lead hands, persons above the rank of supervisor and senior lead hand, sales staff, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit) (*Clarity Notes*)

2854-86-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Norwich Packers Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Norwich save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

2872-86-R: United Steelworkers of America (Applicant) v. Metro Industrial Textiles Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Mississauga, save and except plant manager, those

above the rank of plant manager, and office and sales staff" (34 employees in unit) (*Having regard to the agreement of the parties*)

2915-86-R: Ontario Public Service Employees Union (Applicant) v. Hamilton Wesley House operating as Adolescent Community Care Program (Respondent)

Unit: "all employees of the respondent in its Adolescent Community Care Program in the City of Hamilton, save and except co-ordinator of community program and persons above the rank of co-ordinator of community program" (3 employees in unit) (*Having regard to the agreement of the parties*)

2952-86-R: United Food & Commercial Workers International Union (Applicant) v. Canada Dry Bottling Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at the City of Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, persons employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

2965-86-R: The United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Future Forming Co. Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2982-86-R; 3048-86-R: Canadian Union of Public Employees (Applicant) v. Kingston, Frontenac & Lennox, & Addington Health Unit (Respondent)

Unit: "all employees of the Respondent in the Counties of Frontenac and Lennox and Addington, save and except supervisors, persons above the rank of supervisor, secretary to the Medical Officer of Health, Administrative Assistant (Personnel), and employees for whom any trade union held bargaining rights as of January 29, 1987" (63 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2983-86-R: Canadian Union of Public Employees (Applicant) v. Incorporated Synod of the Diocese of Ottawa (Respondent)

Unit: "all employees of the respondent at its All Saints Women's Shelter in the City of Ottawa save and except coordinators and those persons above the rank of coordinator" (14 employees in unit) (*Having regard to the agreement of the parties*)

2991-86-R: Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (Applicant) v. General Mills Canada, Inc. (Respondent)

Unit #1: "all employees of the respondent at its Red Lobster Restaurant at 1415 Kennedy Road in the Municipality of Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit)

Unit #2: "all employees of the respondent at its Red Lobster Restaurant at 1415 Kennedy Road in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant managers and persons above the rank of assistant manager" (40 employees in unit)

2998-86-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Beaver Foods Limited (Respondent)

Unit: "all employees of the respondent in the Town of Durham save and except Food Supervisor and persons above the rank of Food Supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

3017-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. ABC Taxi (Brockville) Ltd. and Safedrive Inc., c.o.b. as City Cab (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the Respondents in Brockville, save and except supervisors, persons above the rank of supervisor, office and dispatch staff" (50 employees in unit) (*Having regard to the agreement of the parties*)

3034-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. Sydenham Welding Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3046-86-R: Drywall Acoustic Lathing & Insulation Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kirron Drywall Systems Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

3050-86-R: United Steelworkers of America (Applicant) v. Glengary Industries Inc. (Respondent)

Unit: "all employees of the respondent in the City of Guelph, save and except foremen, persons above the rank of foreman, office and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

3100-86-R: The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of The United States & Canada, Local 46 (Applicant) v. OT Industrial Mechanical Contractors Ltd. (Respondent)

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3115-86-R: Service Employees' Union, Local 210, S.E.I.U., AFL:CIO:CLC (Applicant) v. The Salvation Army (Respondent)

Unit #1: "all employees of the respondent employed at the Men's Social Services Centre in Windsor, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all office and clerical employees of the respondent employed at the Men's Social Services Centre in Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

3129-86-R: Canadian Union of Public Employees (Applicant) v. The Fort Erie Society for the Prevention of Cruelty to Animals (Respondent)

Unit: "all employees of the respondent in the Town of Fort Erie, save and except manager and persons above the rank of manager" (6 employees in unit) (*Having regard to the agreement of the parties*)

3153-86-R: Service Employees Union, Local 268 (Applicant) v. The Nipigon-Red Rock Board of Education (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 20 hours per week and students employed during the school vacation period at the Township of Nipigon, Township of Red Rock, Township of Dorion, Townships of Sterling-Lyon, engaged in maintenance, service and plant operations, save and except foremen, persons above the rank of foreman and employees in bargaining units for which any trade union held bargaining rights as of February 18, 1987" (7 employees in unit) (*Having regard to the agreement of the parties*)

3154-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. Corporation of the Township of Portland (Respondent)

Unit: "all employees of the respondent in the Township of Portland, save and except road superintendent, persons above the rank of road superintendent, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

3161-86-R: L'association des Enseignantes et Enseignants Suppléants de Nipissing Séparé Élémentaire (Applicant) v. Le Conseil des Ecoles Séparées Romaines Catholiques du District de Nipissing (Respondent)

Unit: "all occasional teachers employed by le Conseil des Ecoles Séparées du District de Nipissing in its elementary schools or classes in its elementary school where français is the language of instruction, in accordance with Part XI of the *Education Act*, in the District of Nipissing, save and except employees for whom any trade union held bargaining rights as of February 19, 1987" (40 employees in unit) (*Having regard to the agreement of the parties*)

3163-86-R: Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Daheim Nursing Home Limited (Respondent)

Unit: "all employees of the respondent in Uxbridge, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff and employees for whom any trade union held bargaining rights as of February 20, 1987" (43 employees in unit) (*Having regard to the agreement of the parties*)

3169-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Westside Excavating & Grading Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and simi-

lar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3170-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. E. Hansen Excavating & Grading Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3171-86-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ayerswood Development Corporation and Anthony Graat (Respondents)

Unit #1: "all construction labourers in the employ of the respondent Ayerswood Development Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent Ayerswood Development Corporation in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector of the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

3172-86-R: Retail, Wholesale & Department Store Union (Applicant) v. F. W. Woolworth Co. Limited (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at 290 Humberline Drive working in the function identified as 9001 and 2277 Sheppard Avenue West, in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, sales and clerical staff, and those persons for which any trade union held bargaining rights as of February 20th, 1987" (38 employees in unit) (*Having regard to the agreement of the parties*)

3188-86-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Bas-Kim Industries Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

3193-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. J. M. Vinette Ltd. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carlton, save and except supervisors, persons above supervisor, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

3194-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Sketchley Cleaning Services Limited (Respondent)

Unit: "all employees of the respondent at 747 Don Mills Road, in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

3195-86-R: Ontario Nurses' Association (Applicant) v. Harold & Grace Baker Centre (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in the Municipality of Metropolitan Toronto in a nursing capacity in the nursing home section, save and except the Director of Resident Care and persons above the rank of Director of Resident Care and persons regularly employed for not more than 24 hours per week" (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed by the respondent in the Municipality of Metropolitan Toronto in the nursing capacity for not more than 24 hours per week in the nursing home section, save and except Director of Resident Care and persons above the rank of Director of Resident Care" (6 employees in unit) (*Having regard to the agreement of the parties*)

3203-86-R: International Union of Bricklayers & Allied Craftsmen, Local 1, Ontario (Applicant) v. MA-BO Westside Construction Ltd. (Respondent)

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3215-86-R: Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Respondent)

Unit: "all office and clerical employees of the respondent in the City of Brampton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretaries to the president, senior vice-presidents, vice-presidents, assistant vice-presidents, director of personnel and labour relations, medical chief of staff, medical chiefs of service, coordinator of occupational health and safety, and persons in bargaining units for whom any trade union held bargaining rights as of February 26, 1987" (57 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3237-86-R: London & District Building Service Workers' Union, Local 220 (Applicant) v. Sharon Farms & Enterprises Limited (Respondent)

Unit #1: "all employees of the respondent at London, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at London, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, per-

sons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

3314-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Kaneff Properties Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2842-83-R: Labourers' International Union of North America, Local 607 (Applicant) v. Bird Construction Co. Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693 (Intervener)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of persons on revised voters' list		7
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0
Ballots segregated and not counted		9

0256-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Lake Erie Foods Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its plant in Leamington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (80 employees in unit)

Number of names of persons on revised voters' list		85
Number of persons who cast ballots	69	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		45
Number of ballots marked against applicant		16
Ballots segregated and not counted		5

2794-86-R: Canadian Union of Public Employees (Applicant) v. Residence Saint-Louis (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all lay employees of the respondent in Orleans, Ontario, save and except professional medical staff, registered and graduate nurses, registered nursing assistants, professional staff, supervisors, foremen, persons above the rank of foreman, plant manager and assistant plant manager" (75 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	75
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Number of persons who cast ballots	62	
Number of ballots marked in favour of applicant		41
Number of ballots marked in favour of intervener		21

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2364-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dandy Framing Co. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		0
Number of ballots marked in favour of NO TRADE UNION		0

Applications for Certification Dismissed Without Vote

1856-83-R: Lumber & Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. E K T Industries Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 1669 (Intervener #2) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Intervener #3)

Unit: "all employees of the respondent in the geographical Districts of Thunder Bay, Kenora (including the Patricia portion), Rainy River, save and except non-working foremen, office staff and carpenters, carpenters' apprentices and carpenter foremen, employed in all sectors of the construction industry" (13 employees in unit)

1388-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. Stacey Electric Company Limited (Respondent) v. The I.B.E.W. Construction Industry of Ontario and the International Brotherhood of Electrical Workers, Local 586 (Interveners)

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell" (10 employees in unit)

1729-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. Louis W. Bray Construction Limited (Respondent) v. Group of Employees (Objectors) (57 employees in unit)

2384-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dandy Forming Co. (Respondent) (2 employees in unit)

2789-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada (Applicant) v. Brown Boveri Howden Inc. (Respondent) v. Electrical Power Systems Construction Association (Intervener #1) v. Mechanical Contractors Association of Ontario (Intervener #2) (29 employees in unit)

2790-86-R: United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada (Applicant) v. Nicholls Radtke Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervener #1) v. Mechanical Contractors Association of Ontario (Intervener #2) (9 employees in unit)

2791-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. State Contractors Inc. (Respondent) v. Electrical Power Systems Construction Association (Intervener #1) v. Mechanical Contractors Association of Ontario (Intervener #2) (3 employees in unit)

2792-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. Watts & Henderson Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervener #1) v. Mechanical Contractors Association of Ontario (Intervener #2) (3 employees in unit)

2845-86-R: Ontario Nurses' Association (Applicant) v. North Bay & District Health Unit (Respondent) (58 employees in unit)

3088-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. KEC Lumber Supplies Division of Dacon Corporation Limited (Respondent) (44 employees in unit)

3118-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cutrona Haulage & Excavating (Respondent) (2 employees in unit)

3151-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hanson-Needler Corporation and Urban Equities Sherwood Inc. (Respondents) (3 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2814-86-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Wind-sor Wafers, division of Colonial Cookies Ltd., division of Beatrice Int'l. (Respondent)

Unit: "all employees of the respondent in its Colonial Cookies Division in the City of Cambridge, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (157 employees in unit)

Number of names of persons on list as originally prepared by employer		157
Number of persons who cast ballots	147	
Number of ballots marked in favour of applicant		43
Number of ballots marked against applicant		104

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0855-85-R: Ontario Public Service Employees Union (Applicant) v. Ottawa Day Nursery Inc., c.o.b. as Andrew Fleck Child Centre (Respondent)

Unit: "all home day care providers working for the respondent in the Regional Municipality of Ottawa/Carleton, save and except supervisors and those above such rank, and employees in bargaining units for which any trade union held bargaining rights as of July 5, 1985" (111 employees in unit) (*Having regard to the agreement of the parties*)

2745-85-R; 2855-85-R; 2856-85-R: Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sylvor Limitée, Synco Timber Limited (Respondents)

Unit: "all employees of the respondents in their woods operations in the Townships of Byng, Ericson, Pusku-ta, Barker, Nassau, Fushimi, Kipling, Downley, Langemarck, McCowan, Neely, Owens, Williamson and Idington, Opatatika, Eilber and Devitt, and Fleck and those Townships immediately adjacent thereto, save and except foremen, those above the rank of foreman, office, sales, garage employees and mechanics" (27 employees in unit)

Number of persons on voters' list at start of vote		27
Number of persons who cast ballots	26	

Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	21

2220-86-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Rich Products of Canada Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Fort Erie, save and except forepersons, persons above the rank of foreperson, office and sales staff, and research and development technicians" (164 employees in unit)

Number of names of persons on revised voters' list		164
Number of persons who cast ballots	156	
Number of ballots marked in favour of applicant		58
Number of ballots marked against applicant		98

2393-86-R: Ontario Nurses' Association (Applicant) v. Ongwanada Hospital (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity at its Hopkins Division in Kingston, save and except head nurses, persons above the rank of head nurse and persons regularly employed for not more than 24 hours per week" (11 employees in unit)

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		5

Unit #2: (see *Bargaining Agents Certified Without Vote*)

2778-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Bakelite Thermosets Limited (Respondent) v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local 380 (Intervener)

Unit: "all employees of the respondent at Belleville, save and except foremen, persons above the rank of foreman, office, technical and sales staff, stationary engineers and their assistants" (96 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		96
Number of persons who cast ballots	91	
Number of ballots marked in favour of applicant		41
Number of ballots marked against applicant		50

Applications for Certification Withdrawn

2648-86-R: International Ladies Garment Workers' Union (Applicant) v. Astro Sportswear Ltd. (Respondent)

2737-86-R: Ontario Public Service Employees Union (Applicant) v. Payukotayno: James and Hudson Bay Family Services, and North Cochrane District Family Services (Respondents)

2955-86-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hembruff & Dambrowitz Ltd. (Respondent)

2988-86-R: L'association des Enseignantes et Enseignants Suppléants de Nipissing Separé Elémentaire (Applicant) v. Le Conseil des Ecoles Separées du District de Nipissing (Respondent)

3025-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Chouinard Bros. Roofing (Respondent) v. Stanley Shewell (Intervener #1) v. Robert Shewell (Intervener #2) v. Harold Biso (Intervener #3) v. Group of Employees (Objectors)

3090-86-R: Teamsters Local 230, Ready Mix Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. B & L Gottardo Bros. Excavating Ltd. (Respondent)

3117-86-R: Ontario Public Service Employees Union (Applicant) v. Consolidated Maintenance Services Ltd. (Respondent)

3179-86-R: Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Southrim Enterprises Ltd. (Respondent)

3205-86-R: Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Applicant) v. Fratcom Resources, c.o.b. as Beacon Arms Hotel (Respondent)

3281-86-R: Ontario Nurses' Association (Applicant) v. Leamington Nursing Home (Christian Care Centres) (Respondent)

3290-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Sketchley Cleaning Service Limited (Respondent)

3371-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. M. Lanteigne Construction (Respondent)

3361-86-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lider General Construction (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3016-86-FC: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Greek Community of Metropolitan Toronto Inc. (Respondent) (*Withdrawn*)

3199-86-FC: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CLC:CIO (Applicant) v. Tempo Plastics Limited (Respondent) (*Withdrawn*)

3326-86-FC: United Steelworkers of America (Applicant) v. Walter Tool & Die Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2306-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bentall Construction Company Limited/Dominion Construction Company Limited (Respondent) (*Withdrawn*)

2466-86-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Consolidated Aluminum & Glass Corp., and Consolidated Aluminum (Maritimes) Ltd. (Respondents) (*Granted*)

2939-86-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. B & B Ethier Company Limited, c.o.b. as B & B Enterprises Plumbing & Heating Contractors, Babco Plumbing Services Ltd., Babco Heating & Air Conditioning Division and Controlled Air Systems Limited (Respondent) (*Granted*)

3271-86-R: Southrim Enterprises Ltd., c.o.b. as Southrim Continuing Care Services and Belcrest (Toronto) Nursing Homes Ltd., c.o.b. as Roulet Nursing Home Unit of Southrim Continuing Care Services (Applicants) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

3279-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. O. V. Carpentry Ltd., and Mirka Construction Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

1428-86-R: Weston Bakeries Limited (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647; Retail, Wholesale, Bakery & Confectionery Workers' Union, Local 461 of the RWDSU; Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880; Teamsters Local 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; Bakery, Confectionery & Tobacco Workers International Union, Local 322 (Respondents) (*Granted*)

2066-86-R: International Union of Operating Engineers, Local 796 (Applicant) v. Metropolitan Life Insurance Company (Respondent) v. Allen Maintenance Ltd. (Intervener) (*Dismissed*)

2465-86-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Consolidated Aluminum (Maritimes) Ltd. (Respondent) (*Granted*)

2668-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Collavino Incorporated, Collavino-McCall Contractors Ltd., McCall Contractors Ltd., Prestressed Systems Windsor Limited, Prestressed Systems Windsor Incorporated (Respondents) v. United Brotherhood of Carpenters & Joiners of America, Local 494 (Intervener) (*Dismissed*)

2737-86-R: Ontario Public Service Employees Union (Applicant) v. Payukotayno: James & Hudson Bay Family Services, and North Cochrane District Family Services (Respondents) (*Withdrawn*)

2820-86-R: IBEW, Local 2133 (Applicant) v. St. Lawrence Power, and Cornwall Electric (Respondents) v. Canadian Union of Public Employees, Local 1371 (Intervener) (*Withdrawn*)

2837-86-R: Labourers' International Union of North America, Local 607 (Applicant) v. Cencan Concrete & Tile Limited and/or 686807 Ontario Inc. and/or Cencan Group and/or Clarkson Gordon Inc. (Respondents) (*Granted*)

2940-86-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. B & B Ethier Company Limited, c.o.b. as B & B Enterprises Plumbing & Heating Contractors, Babco Plumbing Services Ltd., Babco Heating & Air Conditioning Division and Controlled Air Systems Limited (Respondent) (*Withdrawn*)

3219-86-R: Canadian Union of Operating Engineers & General Workers, Local 101 (Applicant) v. Jefferson Electric (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2627-86-R: Canadian Union of Public Employees (Applicant) v. The Staff Association, Waterloo County Health Unit (Respondent) (*Granted*)

3000-86-R: Canadian Union of Public Employees (Applicant) v. The Staff Association, Family & Children's Services of Durham Region (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3127-85-R: Val McKean, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail store, located in the Scarborough Town Centre, 300 Borough Drive, Scarborough, Ontario M1P 4P5, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, foremen, and persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employ-

ees of Eaton Bay Financial Services, office and clerical staff, management trainees, personnel staff, security staff, medical services nurse, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, students employed on a cooperative program with a school, college or university and employees hired for a specific term to meet seasonal fluctuations of business and for a period of time not to exceed 15 consecutive weeks in any one year" (170 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		170
Number of persons who cast ballots	170	
Number of spoiled ballots		2
Number of ballots marked in favour of respondent		53
Number of ballots marked in favour of NO TRADE UNION		115

3128-85-R: Una L'Estrange, et al. (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail store located at Shoppers' World, 3003 Danforth Avenue, Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food service managers and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business and for a period of time not to exceed 15 consecutive weeks in any one year" (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		64
Number of persons who cast ballots	61	
Number of ballots marked in favour of respondent		25
Number of ballots marked in favour of NO TRADE UNION		36

3129-85-R: Mabel Alexander, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail store located at Shopper's World, 3003 Danforth Avenue, Metropolitan Toronto, regularly employed for not more than 24 hours per week, and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food service managers and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university" (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		72
Number of persons who cast ballots	64	
Number of ballots marked in favour of respondent		21
Number of ballots marked in favour of NO TRADE UNION		43

3130-85-R: Jean Christie, et al. (Respondent) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, located at the Bramalea City Centre, 20 City Centre, Brampton, Ontario L6T 3R8, regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university" (92 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		92
Number of persons who cast ballots	73	
Number of ballots marked in favour of respondent		19
Number of ballots marked in favour of NO TRADE UNION		53
Ballots segregated and not counted		1

3131-85-R: Susan Baker, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all office and clerical employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except managers, those above the rank of manager, employees of Eaton Travel Ltd., personnel staff, secretary to the store manager, medical services nurse and students employed on a co-operative programme with a school, college or university" (6 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked in favour of NO TRADE UNION		5

3132-85-R: B. Murray, S. O'Hagan, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail stores in Brampton, Ontario, located at the Bramalea City Centre, 20 City Centre, Brampton, Ontario, L6T 3R8, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business and for a period of time not to exceed 15 weeks in any one year" (96 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		96
Number of persons who cast ballots	88	
Number of ballot marked in favour of respondent		38
Number of ballots marked in favour of NO TRADE UNION		49
Ballots segregated and not counted		1

3133-85-R: Colin Waring, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail store located in the Scarborough Town Centre, 300 Borough Drive, Scarborough, Ontario, M1P 4P5, regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manger, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services, office and clerical staff, management trainees, personnel staff, security staff, medical services nurse and students employed on a co-operative program with a school, college or university" (273 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		273
Number of persons who cast ballots	273	
Number of ballots marked in favour of respondent		65
Number of ballots marked in favour of NO TRADE UNION		208

3186-85-R: Chris Aquí, on behalf of a group of employees (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees at its retail store in St. Catharines, Ontario, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, security staff, medical services nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, students employed on a co-operative programme with a school, college or university and employees hired for a specific term to meet the seasonal fluctuations of the business for a period of time not to exceed 15 weeks in any one year" (94 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		94
Number of persons who cast ballots	94	
Number of ballots marked in favour of respondent		41
Number of ballots marked in favour of NO TRADE UNION		49
Ballots segregated and not counted		4

3187-85-R: Denise Pegeau, on behalf of a group of employees (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees at its retail stores in St. Catharines, Ontario, regularly employed for not more than 24 hours per week and students employed during the vacation periods, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees at Eaton Travel Ltd., management trainees, security staff, medical services nurse and students employed on a co-operative programme with a school, college or university" (95 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		95
Number of persons who cast ballots	77	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		23
Number of ballots marked in favour of NO TRADE UNION		50
Ballots segregated and not counted		3

0277-86-R: Mike Smith, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener)

Unit: "all employees of the T. Eaton Company Limited at its retail store located at 2300 Yonge Street, Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except sales managers, merchandise presentation managers, food service manager or foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical service nurse and students employed on a co-operative programme with a school, college or university" (78 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters' list		78
Number of persons who cast ballots	55	
Number of ballots marked in favour of respondent		16
Number of ballots marked in favour of NO TRADE UNION		39

0903-86-R: Bernard John Moore (Applicant) v. International Association of Machinists & Aerospace Workers, Local 1975 (Respondent) v. Imperial Clevite Canada Inc. (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

2273-86-R: Dennis O'Connor (Applicant) v. International Woodworkers of America (Respondent)

Unit: "all employees of Jayden Inc. in Hyde Park, Ontario, save and except Department Heads, persons above the rank of Department Head, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (36 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots	35	
Number of ballots marked in favour of respondent		14
Number of ballots marked against respondent		21

2710-86-R: Douglas Gustafson (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Mayhurst Realty Limited (Intervener)

Unit: "all employees of Mayhurst Realty Limited engaged in cleaning at 10 Shallmar Boulevard, Toronto, Ontario, including resident superintendents, save and except property manager, office and clerical staff and persons regularly employed for not more than 24 hours per week" (1 employee in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

2744-86-R: Employees of L & J Plumbing & Heating Ltd. (Applicant) v. Christian Labor Association of Canada (Respondent) (*Withdrawn*)

2745-86-R: Robert Deboo (Applicant) v. Hotel & Restaurant Employees' & Bartenders' International Union, Local 280, Beverage Dispensers' Union (Respondent) v. Dynasty Inn, 629809 Ontario Limited (Intervener)

Unit: "all full-time and part-time employees (male and female) of the Company employed in its liquor lounges in the following categories of employment: tapmen, bartenders, beverage waiters and waitresses, bar-boys, floormen and improvers" (16 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		10

2747-86-R: John Soares, on behalf of employees of M. J. Daley Manufacturing Co. Ltd. (Applicant) v. Sheet Metal Workers' International Association, Local 540 (Respondent)

Unit: "all employees of M. J. Daley Manufacturing Co. Ltd. in the Municipality of Metropolitan Toronto, in the County of York, save and except foremen, persons above the rank of foreman, engineering and sales and office staff" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	9	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		10

2802-86-R: Employees of Trio Press (Applicants) v. Toronto Typographical Union, Local 91 (Respondent) v. Trio Press Limited (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

2886-86-R: Harold McCabe (Applicant) v. Canadian Union of Operating Engineers & General Workers, Local 100 (Respondent) v. Borden Foods, division of Borden Company, Limited (Intervener) (1 employee in unit) (*Granted*)

2898-86-R: David James Barton Carter (Applicant) v. United Food & Commercial Workers International Union, Local 326 (Respondent) v. Formula Plastics Inc. (Intervener) (*Dismissed*)

3110-86-R: Susan Darlene Todd (Applicant) v. Teamsters Local Union 879 (Respondent)

Unit: "all office and clerical employees of Gillies-Guy, a division of Ultramar Canada Inc. working at the company's office at 1605 Main Street West, Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff, secretary to the president, secretary to the manager-operations and terminals, payroll supervisor, accounting personnel above the rank of intermediate accounting, dispatchers, messengers, employees employed for not more than 24 hours per week and those employees covered by existing collective agreements with Teamsters Local 879" (6 employees in unit) (*Granted*)

3112-86-R: Tony Amico (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent)

Unit: "all employees of Anderson's City Farms/ValuMart in the Municipality of Metropolitan Toronto, save and except Department Heads, persons above the rank of Department Head and persons regularly employed for not more than 24 hours per week" (14 employees in unit) (*Granted*)

3113-86-R: Joy A. Hallam (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent) (40 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3264-86-U; 3265-86-U: Transit Windsor (Applicant) v. Amalgamated Transit Union, Local 616 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1536-84-U: Arthur Varty (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent) (*Dismissed*)

1537-84-U: Joseph Chopp (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent) (*Granted*)

1538-84-U: Elzear Loisel (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent) (*Dismissed*)

1716-84-U: Schneider-Link Office Employees' Association (Complainant) v. J. M. Schneider Inc., and Link Services Inc. (Respondents) (*Dismissed*)

2066-84-U: Canadian Union of United B.F.C.S.D., Local 304, and Marianne Turner, Candy Devlin, Joyce Coughlin, Cathy Hammer & Karen Northey (Complainants) v. Canada Trustco Mortgage Company (Respondent) (*Dismissed*)

0114-85-U: Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Rexwood Products Limited (Respondent) (*Granted*)

2824-85-U: Brian Fry (Complainant) v. Teamster Union Local 419 (Respondent) (*Dismissed*)

2854-85-U: Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Synco Timber Limited, Sylvor Limitée, Mr. Roger Paquin (Respondents) (*Dismissed*)

0053-86-U; 0054-86-U: United Brotherhood of Carpenters & Joiners of America, Local 18 (Complainant) v. Ben Plastering Limited, c.o.b. as Belmont Plastering Company (Respondent) (*Withdrawn*)

0641-86-U: George Xerri (Complainant) v. UAW Canada, Local 112 (Respondent) (*Granted*)

0810-86-U: Aluminum, Brick & Glass Workers International Union (Complainant) v. Farris Industries Canada/Teledyne Industries Canada Ltd. (Respondent) (*Withdrawn*)

0853-86-U; 0956-86-U: Canadian Union of Public Employees (Complainant) v. Umfreville District School Area Board (Respondent) (*Granted*)

1368-86-U: Ontario Public Service Employees' Union (Complainant) v. Regional Children's Centre of Thunder Bay (Respondent) (*Dismissed*)

1712-86-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Cambridge Canadian Foods Inc. (Respondent) (*Granted*)

2083-86-U: Randy Sayles (Complainant) v. Wilson Truck Lines, and Canadian Union of Drivers & General Workers (Respondents) (*Withdrawn*)

2141-86-U: Carmen Imbroll (Complainant) v. Aluminum, Brick & Glass Workers International Union, Local 200G, AFL:CIO:CLC (Respondent) (*Withdrawn*)

2201-86-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. T. Eaton Company Limited (Respondent) (*Withdrawn*)

2202-86-U: BIMAC Canada Metallurgical Limited (Complainant) v. United Steelworkers of America (Respondent) (*Dismissed*)

2240-86-U: Canadian Union of Public Employees, Local 1230 (Complainant) v. Utlas International Canada, division of International Thomson Ltd. (Respondent) (*Withdrawn*)

2287-86-U: Canadian Union of Public Employees, Local 2002 (Complainant) v. Noel Ambulance Service (Respondent) (*Withdrawn*)

2291-86-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Complainant) v. H. G. Air Systems Ltd. (Respondent) (*Withdrawn*)

2334-86-U: United Steelworkers of America (Complainant) v. BIMAC Canada Metallurgical Limited (Respondent) (*Dismissed*)

2369-86-U: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Complainant) v. Carp Concrete Limited (Respondent) (*Withdrawn*)

2415-86-U: United Plant Guard Workers of America, Local 1962 (Complainant) v. National Protective Services Inc. (Respondent) (*Withdrawn*)

2431-86-U: United Steelworkers of America (Complainant) v. Allan Windows Incorporated (Respondent) (*Withdrawn*)

2452-86-U: Canadian Union of Representatives & Employees (Complainant) v. United Food & Commercial Workers International Union, AFL:CIO:CLC (Respondent) (*Withdrawn*)

2582-86-U: United Steelworkers of America (Complainant) v. BIMAC Canada Metallurgical Limited (Respondent) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

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**A Monthly Series of Decisions from the
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2360-84-U Michael Baranowski, Complainant v. Teamsters Union Local 938, and TNT Canada Inc. carrying on business as TNT Railfast, Respondents

Duty of Fair Representation - Practice and Procedure - Events comprising complaint taking place in 1983 - Complaint filed in 1984 - Union's timeliness objection dismissed in 1985 and matter adjourned - Complainant failing to bring matter back on for a hearing for two years - Board declining to entertain complaint on the basis of delay resulting from the complainant's failure to pursue the matter without a satisfactory explanation

BEFORE: *Judith McCormack*, Vice-Chair.

APPEARANCES: *A. W. Klymko* and *Michael Baranowski* for the complainant; *Eric del Junco* for the respondent.

DECISION OF THE BOARD; May 11, 1987

The Board issued the following oral decision at a hearing scheduled in this matter on May 11, 1987:

This matter is a complaint under section 89 of the *Labour Relations Act* alleging a violation of section 68. The events which are the subject of this complaint took place in April and May of 1983, and the complaint was filed in November of 1984, some eighteen months later. When the matter came up for hearing, the respondent union requested that the complaint be dismissed on the basis that it was untimely. The Board, in a decision which described the complainant's case as "border line" in terms of the jurisprudence on dismissal for delay, dismissed the union's timeliness objection on January 29, 1985. A request for reconsideration was received and rejected by the Board on March 6, 1985.

The complainant then sought to add the employer as a respondent in March of 1985. By a decision dated May 13, 1985, the Board dismissed the complainant's motion citing extreme delay on the complainant's part. That decision also recites the fact that the parties agreed to adjourn the matter at that time.

Nothing more was heard from the parties for almost two years until the complainant wrote a somewhat ambiguous letter to the Board on February 26, 1987. As a result, a hearing was scheduled for the purpose of hearing the parties' representations as to why the Board should now entertain the complaint. The hearing date was adjourned twice at the request of the parties.

The respondent union asked us to dismiss the complaint on three grounds. Firstly, counsel argued that the decision of the Board of January 29, 1985, dismissing the union's timeliness objection and the decision of the Board of May 13, 1985, dismissing the complainant's motion to add the employer as a respondent were inconsistent and presented new grounds for a further reconsideration of the January 29, 1985 decision. Secondly, counsel suggested that Practice Note 14 applied to these circumstances so as to deem the complaint withdrawn at the expiry of one year from the date of the adjournment. Finally, the Board was asked to exercise its discretion to refuse to entertain the

complaint as a result of the further delay which occurred since the Board's decision of May 13, 1985.

I do not find the first ground raised by the respondent union persuasive. One request for reconsideration has already been rejected, and in any event, requests for reconsideration are more properly directed toward the panel making the original decision. In these circumstances, it would be inappropriate for the Board to engage in what would in essence be an appeal from the Board's decision of March 6, 1985 rejecting the initial request for reconsideration.

Neither am I convinced that Practice Note 14 applies to the circumstances before me. That note contains certain conditions which must be met before a case will attract the consequences set out therein, and I am not persuaded that those conditions have been satisfied here.

However, I find the third argument advanced by the respondent union has considerable merit. The Board expects complaints of this nature to be pursued expeditiously and with some dispatch. As a result of the complainant's failure to bring the matter back on for a hearing, almost two years have elapsed from a point in time which the Board had already characterized as representing extreme delay. Now almost four years have elapsed since the events which form the subject of the complaint.

Counsel for the complainant argued that he believed that the Registrar would be setting a date in this matter and was therefore awaiting of notice of hearing during the period in question. While I might be receptive to that argument in other circumstances, I find it simply incomprehensible that counsel would allow almost two years to elapse without making any inquiry whatsoever in this regard. This is particularly so in circumstances where, as a result of the Board's previous proceedings, counsel knew or ought to have known of the Board's serious concerns about the delay which had already taken place.

On the basis of the delay resulting from the complainant's failure to pursue this matter without a satisfactory explanation between May of 1985 and February of 1987, the Board declines to entertain this complaint. These proceedings are now at an end.

0657-84-R Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Brink's Canada Limited** and A.T.M. Automatic Teller Machines Services, Ltd., Respondents

Related Employer - ATM set up by Brink's as a wholly owned subsidiary to service automatic teller machines rather than have the work done by one of Brink's Divisions - ATM and Brink's found to be related employers - Board identifying factors to be considered in deciding whether a one employer declaration should be made - Brink's corporate organization cannot be used to override the use of s. 1(4) - Applicant acted promptly to protect its bargaining rights from erosion - One employer declaration made and ATM declared to be bound by collective agreement - Nothing causing Board to limit retroactive effect of declaration

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. H. Blair* and *L. C. Collins*.

DECISION OF THE BOARD; May 7, 1987

1. The Board has previously issued a decision in this proceeding under sections 1(4) and 63 of the *Labour Relations Act*. For reasons which were to issue at a later date, the Board declared that Brink's Canada Limited and A. T. M. Automatic Teller Machines Services, Ltd., were to be treated as constituting one employer for purposes of the Act. The Board declared also that A. T. M. Automatic Teller Machines Services, Ltd., "... is bound to the collective agreement between Brink's Canada Limited and the applicant which has application to the Toronto Armoured Division of Brink's Canada Limited.". The instant decision sets out the Board's reasons therefor.

2. Respondent counsel argued and applicant counsel agreed during his submissions that section 63 of the Act has no application to the circumstances of this case. The Board agrees. Therefore, this application is dismissed insofar as it relates to section 63 of the Act.

3. Section 1(4) of the *Labour Relations Act* provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The wording of the section requires that three conditions be met in order for the Board to have the discretion to make a "one employer" declaration and grant any other form of relief under the section. They are:

- (1) There must be at least two entities.
- (2) Those entities must have carried on associated or related activities or businesses.
- (3) They must be under common control or direction.

4. The findings of fact set out herein which are relative to the existence of the three preconditions and to the exercise of the Board's discretion are derived from the evidence of Bradley

Johnston, an employee of A. T. M. Automatic Teller Machines Services, Ltd., Gordon Rollins, Manager, Inside Operations for Brink's Canada Limited, George Gunn, District Manager Operations for Brink's Canada Limited, all of whom testified on behalf of the respondents, Paul Ostrom, a business agent of the applicant on leave of absence from Brink's Canada Limited, Don Tessier and Greg Sutherland, employees of Brink's Canada Limited, and Ray Rock, business agent for Local 879, a sister local of the applicant, all of whom testified on behalf of the applicant. The findings of fact reflect the Board's assessment of the witness' credibility based on the usual criteria.

5. Brink's Canada Limited is a wholly owned subsidiary of Brink's Incorporated, a United States corporation. A. T. M. Automatic Teller Machines Services, Ltd., is a wholly owned subsidiary of Brink's Canada Limited. For ease of reference, the Board will refer to Brink's Incorporated as Brink's Inc., to Brink's Canada Limited as Brink's and to A. T. M. Automatic Teller Machines Services, Ltd., as ATM. This decision is concerned primarily with the Toronto District operations of Brink's. Prior to the advent of ATM, these operations were comprised of four unincorporated divisions: Toronto Armoured, Toronto Tractor Trailer, Toronto Banking Services, and Toronto Coin. The Toronto Armoured and Toronto Tractor Trailer divisions report to the Manager Outside Operations and the Toronto Banking Services and Toronto Coin divisions report to the Manager, Inside Operations. The two managers report to the District Manager of Operations, George Gunn. In addition, there is a Toronto District office which has its own manager who also reports to Gunn. It is not a division.

6. The applicant holds bargaining rights for the employees of the Toronto Armoured Division pursuant to a collective agreement between the applicant and Brink's, and an addendum to that agreement covers the employees of the Toronto Tractor Trailer Division. There is a separate collective agreement between the applicant and Brink's covering the employees of the Toronto District office. Employees of the Toronto Banking Services and Toronto Coin divisions are not covered by any collective agreement, although the applicant was certified on August 1st, 1978, to be the exclusive bargaining agent for the employees of the Toronto Banking Services Division.

7. Brink's Inc. operates an international air courier service which serves the Toronto District but does not come under Brink's management, although it receives certain services from the Toronto District divisions of Brinks. For example, the Toronto Armoured Division does all pick-ups and deliveries in the Toronto area for the air courier service, prepares the couriers' pouches and puts them aboard the aircraft.

8. ATM is incorporated under the Canada Business Corporations Act and its letters patent were issued June 14, 1984. The directors and officers of ATM at the time of incorporation and at the time of this application are or were officers of Brink's Inc. and Brink's. ATM received its initial capitalization from Brink's. The first three months of its operation absorbed approximately \$50,000 in working capital. Its assets were purchased by Brink's Inc. and charged back to ATM in accordance with Brink's Inc. policy. Brink's Inc. pays the invoices on all asset purchases for the divisions of Brink's and ATM was treated no differently than any of the Toronto divisions have been treated. In fact, ATM operates as a division of Brink's under a manager, Clark Jerman, who reports to the Manager, Inside Operations, Rollins. Jerman transferred to ATM from one of the other divisions, as did at least one other identified employee who transferred from the Toronto Armoured Division. Rollins testified that some of the initial employees were selected from the money room of the Toronto Banking Services Division, but the evidence does not identify who they were or how many were obtained from this source. Some of ATM's start up equipment was transferred to it from other Toronto divisions. This included one of the armoured vans for the secure delivery of money, and equipment used for counting paper currency.

9. The head office of Brink's provides some common services to the operating divisions. These include the purchasing of physical assets, although, as noted earlier, Brink's Inc. pays the invoices for these purchases and charges them back to the using division, sales and marketing, labour relations and firearms training. Sales proposals to potential ATM customers were made on Brink's letterhead by Brink's representatives. ATM's accounts payable are paid by Brink's head office. The centralized labour relations services include the use of a common application for employment form for all Brink's divisions, the use of Brink's payroll cheques drawn on a common Brink's payroll account and employment services such as the processing of all applications for employment forms, the interviewing and screening of job candidates and their referral to their operating divisions for employment.

10. The unincorporated divisions of Brink's provide various money services for its customers which include banks, other financial institutions and commercial enterprises. The Toronto Armoured Division provides secure storage and transportation of money and other valuables. In the recent past, these services included payroll cheque cashing and preparing and supplying currency and coinage for money changing purposes. Most of the money transported by the division is in the form of sealed packages of large amounts. Approximately 65 per cent of the division's customers are banks. One of the services which the division provides for some banks is the delivery and safekeeping of paper currency used in automatic teller machines (hereinafter "teller machines"). These teller machines are remote from branch bank locations. The service involves picking up packages of money, usually from a supply belonging to the customer which is stored with Brink's, taking the money to the host bank branch, picking up employees of the bank and transporting them and the money to the teller machine locations. In some cases, the Brink's employees meet the bank employees at the machines. At the locations, the Toronto Armoured Division employees provide guard service for the bank employees while they service the teller machines. Once the machines have been serviced by the bank's employees, they are escorted back to the host branch. If the bank employees retrieve any money from the machines the Brink's employees deliver it either to a designated location of the customer or to Brink's storage vaults. After ATM began servicing teller machines, the Toronto Armoured Division continued to provide this service for some banks, but the number of deliveries decreased when some of its customers switched to ATM's more complete service. None of the division's employees were laid off as a result of this transfer of business and, for one of the division's customers, there was an actual increase in the number of teller machine calls per week. The teller machine calls which were lost were eventually replaced by an increase in deliveries by the Toronto Armoured Division to the banks of money processed by the Toronto Banking Services for use in automatic teller machines.

11. The money used for the teller machines is prepared by Toronto Banking Services. Employees of its money room cull paper currency supplied by the bank customer to Brink's. The paper currency used in the teller machines must be in very good condition in order to operate in the cassettes which are used in the machines. Money room employees count out the currency and load the cassettes for delivery to the machines. As well as culling currency for this use, the money room employees cull it for further uses by the banks or for destruction if it is damaged sufficiently to be taken out of circulation. The money intended for further use by the banks is counted and packaged by the money room employees.

12. The Toronto Coin Division counts and rolls coins into packages for use by Brink's customers. The Toronto Tractor Division provides secure, over-the-road transportation of money and other valuables.

13. The concept which led to the formation of ATM grew out of the cash culling business of the Toronto Banking Services Division. In early 1982, one of Brink's bank customers asked it to

cull cash for it as part of the cassette loading operation which the division was providing for the bank. Sometime after that, another financial institution asked Brink's if it would provide a full money service for its teller machines. Brink's did not consider this to be compatible with its normal kind of business, but since there was promise of more business if the trial was successful, ATM eventually was set up to operate the service. The operation which ultimately became ATM's began in the fall of 1983 from a location in the City of Scarborough. The other divisions operate at and out of a location in the City of Toronto. It would appear from the evidence that, at the time, Brink's had decided that the new service should not be provided by the Toronto Armoured Division, but had not decided the specific organizational format. Acting on legal advice, Brink's eventually decided to incorporate a separate company to operate the service. This became ATM. For ease of reference, unless the context requires otherwise, the Board will refer to the new operations as though they were ATM's from the beginning. The operations started with a van obtained from the Toronto Armoured Division and four or five employees. Near the conclusion of these proceedings, there were approximately 20 employees in ATM's operations. Brink's did not tell the applicant of the move. Ostrom learned of it five or six months later when he investigated a tip that he might find Brink's operating out of the Scarborough location. He contacted Brink's officials at the beginning of April 1984 about the work being performed from that location and met with them some three weeks later for further discussions. By letter dated April 27, Ostrom advised Brink's that the applicant was initiating arbitration of the issue. It was Ostrom's evidence that the applicant was seeking to arbitrate, pursuant to Article I of the agreement, the classifications and wage rates for the work being done out of the Scarborough location. Next, the applicant brought this application on June 5, 1984, in part because the applicant believed that an arbitrator would not be prepared to decide whether ATM and Brink's were related employers bound to a common agreement with the applicant and, therefore, would not make any orders against ATM. It was the applicant's view that a declaration from this Board that they were one employer for purposes of the Act would remove that obstacle.

14. ATM operates, in general terms, to service remote teller machines for banks and other financial institutions by keeping the machines supplied with money and supplies consumed in the operation of the machines, performing minor repair and maintenance on them, retrieving deposits made by the teller machines' customers and delivering those deposits to the client bank. The client bank's money is used to supply the machines. ATM receives supplies of money either directly from the bank or from money held by Brink's on behalf of the bank. The money is delivered to ATM's location by vans of the Toronto Armoured Division. The division regularly picks up currency and teller machine supplies from the banks, in conjunction with its other services to banks, and delivers them to ATM. ATM is charged with the cost of the deliveries. More than 50 per cent and less than 75 per cent of the money used by ATM has been processed in the money room of the Toronto Banking Services Division. ATM receives the money in sealed, bulk, packages. Its vault employees unseal the packages, verify the contents, using currency counting equipment if necessary, and load the bills into the cassettes which are used in the teller machines. The cassettes take either ten dollar or twenty dollar bills according to the particular machines.

15. The teller machines serviced by ATM are organized into routes. A crew of three services each route, using an armoured van to make its deliveries. The frequency of service is agreed upon by ATM and the customer. When the crew arrives at a machine, one member remains with the van while the other two go to the machine. The crew member remaining on the van is linked electronically to one of the other two. While the other two are proceeding to the machine, one of them is acting as a guard and the other is carrying the money and other supplies. At the machine kiosk, they follow prescribed procedures for opening the kiosk, dealing with the alarm system and gaining access to the inside of the machine. Once inside the machine, the crew has access to the money cassette, customer deposits which are in sealed envelopes and the machine's transaction

record. The money cassette which has been in the machine is removed and replaced with a new one; the deposit envelopes are retrieved and counted; the number of deposit envelopes are compared with the machine's transaction record and any discrepancy noted on a worksheet. The worksheet is signed by both employees and placed in a deposit bag together with the deposit envelopes and a copy of the machine's transaction record. The bag is sealed, and at the end of the run it is returned to the host bank. While still at the machine, the crew runs a function test by pressing a button on the machine which causes it to check itself. If there is any malfunction, the machine identifies the nature of it by a code which can be checked against a manual carried by the crew. The crew will correct the problem if it can and, if not, it will arrange for the appropriate service. The crew also cleans the kiosk, uses an airbrush to clean dust from around the machine itself and replenishes the supplies of transaction cards and envelopes used by the machine. These services are usually performed between midnight and 8:00 a.m.

16. ATM also provides minor repair and maintenance service during other hours. It has crews of two on call between 8 a.m. and 11 p.m. There is usually one crew on call during the day shift and two during the afternoon shift. They do minor repairs and maintenance which require no tools and include such things as removing money which has stuck in a cassette or in the machine. Repairs which they cannot perform are done by the equipment supplier, but members of the ATM crew have to provide access and guard service while the equipment supplier's repairman makes the repairs.

17. ATM has complete control of the teller machines during service, its employees load the machines with money of an amount decided by ATM, retrieve deposit envelopes and transaction records from the machine, test the machine's functions, are responsible for all locks on the machines and change their combinations from time to time as well as change the pass code on the alarm systems of the machines. These functions, together with the preparation of the cassettes and the performance of minor repair and maintenance constitutes "full service" of the teller machines. ATM was created for the purpose of providing full service to its customers, the majority of which are customers of Brink's other money services. All ATM employees alternate between vault work, servicing the teller machines and performing the minor repair and maintenance.

18. The collective agreement between the applicant and Brink's which applies to Toronto Armoured Division employees is referred to as the Toronto Truck Agreement. The bargaining unit is described in clause (a) of Article I of the agreement and it states as follows:

- (a) The UNION is hereby designated as the sole and exclusive collective bargaining agent for any and all employees who during the term of this Agreement work as Assistant Cashiers, Messengers, Chauffeurs, Tellers, Guards, Mechanics and Garage Helpers for the EMPLOYER out of its Toronto, Ontario office. If the EMPLOYER shall establish a new classification under which work is performed on the armoured cars or in the vaults, the EMPLOYER agrees to negotiate with the UNION on the question of Union jurisdiction of such classifications and on the hourly rates to be paid employees in such classifications. If the parties cannot agree on the above issues, either party may submit the issue or issues to arbitration herein provided.

The classifications by which the bargaining unit is described are reflected by the classifications listed in the wage schedule in Article II: assistant cashier, messenger, mechanic, chauffeur-teller, garage helper and guard. Three of those classifications apply to the armoured van crews who make the money deliveries to and provide guard services at the teller machines: messenger, chauffeur-teller and guard. Regular full-time employees in these classifications are eligible to bid three times each year for particular blocks of runs in a classification they are capable of performing or, if they can perform all of the functions of the three classifications, they can bid for one of three coverman jobs Brink's is required to post. Covermen are the first to be assigned to day-to-day vacancies.

Employees who elect not to bid or who are ineligible to bid are assigned to a pool of employees. These employees get assigned to vacancies in the bid runs or to any unbid runs.

19. Those facts leave no doubt that the respondents to the application are two separate entities: Brink's Canada Limited and A.T.M. Automatic Teller Machines Services, Ltd. They are separate corporations, the second being the wholly-owned subsidiary of the first, which, in turn, is a wholly-owned subsidiary of Brink's Incorporated. Nor do the facts leave any doubt that Brink's and ATM are under common direction or control within the meaning of section 1(4) of the Act. They share or have shared common directors and officers, either directly between them or through Brink's Inc. While ATM and the other divisions of Brink's each have their own managers, those managers all report to George Gunn, Brink's District Manager of Operations, who in turn reports to the Executive Vice-President of Brink's. ATM shares with the other Brink's divisions the central services, including labour relations, proved by Brink's head office.

20. With respect to the third condition precedent to a positive finding under section 1(4), that is whether Brink's and ATM are carrying on related activities or businesses, counsel for the two respondents argued that they were not. The Board obviously has disagreed with counsel. There are, without question, numerous differences in detail of the activities and businesses of the two respondents. ATM's operations as a division of Brink's are comprehensive and include the processing of loose, paper currency, the loading of teller machine cassettes with that currency, the delivery of those cassettes to teller machines, the retrieval of cassettes, deposit envelopes and transactions records from the machines and the other related servicing activities as well as the minor repair and maintenance of the machines. They carry out these function for the major part without having to deal face to face with ATM's customers or its customers' clients. The major exception is when they return the retrieved deposit envelopes to the customer at the end of each day's run. ATM's operations involve a mix of inside and outside work. There is nothing in its operations which is comparable to the Toronto Coin Division or the Tractor Trailer Division. The function of counting paper currency and loading it into teller machine cassettes is one of the functions of the business of the Toronto Banking Service Division. The Toronto Armoured Division's business is largely involved in providing its customers with local, secure transportation of money and valuables. While its assistant cashiers, drivers and messengers have handled and do handle loose currency and coins, most of the money transported for customers is in large amounts carried in sealed parcels and delivered directly to the customer or its clients. This function involves the division's employees in dealing, on a regular basis, face to face with the customers and the customers' clients. The order of magnitude of the financial liability of the Toronto Armoured Division's truck crews is very much larger than that of the truck crews of ATM.

21. These differences in the nature of the operations of ATM compared with the other divisions of Brink's notwithstanding, their basic operations involve the secure storage, processing and transportation of valuables, particularly money, for banks, and other institutions which provide financial services requiring the storage and transportation of valuables, and for the clients of those customers. Section 1(4) of the Act requires that the businesses or activities of the separate entities be related, not duplicated. ATM and Brink's are both primarily engaged in providing for their customers secure storage for valuables, including cash and an armoured van service for the transportation of those valuables from place to place. That is the essential nature of their activities and businesses and the differences enumerated above, in the Board's view, are not consequential enough to cause the Board to find that they do not carry on related activities or businesses. Thus the Board finds that Brink's and ATM carry on related activities or businesses within the meaning of section 1(4) of the Act.

22. Counsel for Brink's and ATM had relied on several Board decisions to argue that the

evidence respecting the relationship between the two corporations had not satisfied the three pre-conditions of section 1(4), particularly the requirement that they be carrying on related activities or businesses. All of the decisions were readily distinguishable on their facts from this application. In the result, the Board finds that Brink's Canada Ltd., and A.T.M. Automatic Teller Machine Services, Ltd., carry on related activities or businesses under common direction or control within the meaning of section 1(4) of the Act.

23. The remaining issue, and the one on which the parties focussed the greatest attention, is whether the Board should exercise its discretion to declare that Brink's and ATM be treated as one employer for purposes of the Act. The parties made extensive submissions on this issue. The Board will not detail their arguments here, but it has reviewed and weighed them in the process of making its decision to issue the "one employer" declaration.

24. The thrust of the submissions of counsel for the respondents was that the Board should not declare Brink's and ATM to be one employer because the introduction of ATM's operations had created none of the mischief which section 1(4) is designed to protect against; there was no evidence of any intent on the part of Brink's to avoid its bargaining obligations to the applicant under either the Toronto Truck Agreement or the agreement covering the office employees; and, the applicant's bargaining rights for Brink's employees, particularly those of the Toronto Armoured Division, had been not suffered any erosion because no jobs had been lost as a result of ATM's operations.

25. What has happened, counsel argued, is that ATM has developed a new service for its customers, some of whom are not customers of the other Brink's divisions. The nature of the work involved in ATM's operations integrates tasks performed by at least two other Brink's divisions, that is the Toronto Banking Services and the Toronto Armoured Division, as well as tasks not presently done by any of the other Brink's divisions, for example, the minor repair and maintenance of the teller machines. Furthermore, ATM's employees are fully interchangeable between the different tasks involved in its operations. The work has been organized that way in order to satisfy customer demand for "full service" to the teller machines. By contrast, counsel argues, the truck employees of the Toronto Armoured Division are not trained to be fully interchangeable between the jobs of messenger, driver, and guard and, while the bid system may provide for some interchange it is limited by the conditions of the Toronto Truck Agreement to taking place three times each year.

26. Counsel contends that section 1(4) should not be applied so as to disrupt the way an employer has organized its business. Yet, counsel argues, that would be the result were the Board to declare ATM to be one employer with Brink's because of the differences which exist in the work performed by ATM employees in contrast with that performed by, for example, the Toronto Armoured Division employees. Counsel claims that these differences are so substantial that only an ancillary part of the work of ATM employees would be captured by the applicant's bargaining rights respecting the employees of the Toronto Armoured Division. As an example, counsel argues, ATM employees who prepare the money cassettes and who perform the minor repair and maintenance on teller machines, perform tasks which have no counterpart in the Toronto Armoured Division bargaining unit. Thus when they are doing that work they would be performing work which is not included within the scope of that unit and the applicant would have no bargaining jurisdiction for them. This means that ATM employees, as they transferred between the different tasks, would at one time be covered by the Toronto Truck Agreement and other times not. Counsel claims that this could result in the ATM employees transferring in and out of the bargaining unit on a daily basis, a situation which would create unreasonable disruption of ATM's operations.

27. Another branch of counsel's argument that the Board should not issue a "one employer" declaration is that the applicant is attempting to use section 1(4) of the Act in order to circumvent the certification procedures of the Act. In other words, counsel contends that the applicant should be making an application for certification to represent the employees of ATM and not be trying to sweep them into the existing collective agreement with Brink's by means of a section 1(4) declaration. To allow the applicant to do so would be to let it gain bargaining rights for ATM's employees without a test of their wishes about trade union representation. Counsel claims also that the applicant has stepped out of character from its historical approach to obtaining bargaining rights for Brink's employees. According to counsel, the applicant previously had recognized Brink's operating divisions as distinct entities and, in seeking to obtain representation rights for employees of those divisions, had applied for certification or sought voluntary recognition by Brink's on a division by division basis. That, counsel contends, is what the applicant should be required to do with respect to the employees of ATM. This is because ATM is a separate company, carrying on a different business than the other Brink's divisions and its employees do different work than the employees of the other Brink's divisions. Therefore the applicant should not be permitted to use section 1(4) of the Act to sweep the ATM employees into the bargaining unit of the Toronto Truck Agreement.

28. With respect to the Board's discretion under section 1(4), counsel for the respondent submits that the Board's decisions make it clear that it does not automatically grant relief every time that it finds two or more entities to be carrying on related activities or businesses under common direction or control, rather it is a matter of the Board's discretion whether it will make a one employer declaration in those circumstances. In that respect counsel argues that the Board's decision in *Harold R. Stark Ltd.*, [1978] OLRB Rep. Oct. 945 identifies three factors considered by the Board in deciding whether a one employer declaration should be made. These are:

- (1) whether the applicant has acted promptly to seek section 1(4) relief after it first became aware that the two entities are closely associated in their businesses;
- (2) whether there are employees whose rights under the Act to choose their own bargaining agent would be interfered with; and
- (3) whether the applicant is trying to use section 1(4) to circumvent the normal process of certification.

29. Counsel contends that there are many factors existing in this application which should cause the Board not to declare Brink's and ATM to be one employer for purposes of the Act. There is no confusion amongst the employees of either ATM or Brink's as to who is their employer. The ATM employees do not perceive themselves to be the same as Brink's employees. There has been no lay-off of Toronto Armoured Division employees as a result of ATM's business activities, therefore there has been no erosion of the applicant's bargaining rights for employees of the Brink's Toronto Armoured Division. There has been a steady build-up in the number of employees employed by ATM from the start of its operations through the making of this application and during the hearings into the application, and for the Board to apply section 1(4) to the two employers would deny these employees the freedom of choice regarding trade union representation which is guaranteed by the Act. There is a multitude of differences between ATM's business and the business of the other Brink's divisions and, therefore, the work performed by ATM employees is vastly different from the work performed by other Brink's employees. The effect of applying section 1(4) would cause substantial disruption to the way in which Brink's has organized its business through its various divisions, and particularly in ATM because only part of the work performed by

ATM employees would come under the Toronto Truck Agreement. In view of that risk of disruption and absent any anti-union motive on the part of Brink's, the Board should not declare Brink's and ATM to be one employer under the Act.

30. A primary purpose of section 1(4) of the Act is to protect a trade union's existing bargaining rights from being eroded by the transfer of work from employees which it represents in collective bargaining to employees of a related employer who are not represented in collective bargaining. The Board addressed that purpose in the following terms in its decision in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388, at paragraph 20:

The Board regards one of the purposes of section 1(4) as being to protect existing bargaining rights from being undermined by a unionized firm directing work to a related non-union firm. (See *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914.) Further, although the non-union firm may have hired employees to perform the work, in our view, if a trade union acts reasonably promptly to secure its bargaining rights, then the rights of the trade union should generally take priority over whatever may be the views of these employees regarding union representation. As the Board indicated in the Farquhar case, *supra*, the position of these employees may be likened to that of employees hired as a result of a post-certification buildup of an employer's work force. While they may not desire collective bargaining, or may even desire to be represented by another trade union, the existing structure is the one which has been established to govern their employment relations, at least until such time as an application to terminate or displace bargaining rights is timely. However, where a union, for reasons of its own, stands by and does not seek to protect its bargaining rights while a non-union work force is assembled and employed for a considerable period of time, then the wishes of those employees does become a relevant consideration. The application of section 1(4) in such a situation may well result in a union expanding existing bargaining rights or re-acquiring bargaining rights long since abandoned, notwithstanding the fact that the union may lack support among the employees who would reasonably have assumed that the union was not their bargaining agent. In such situations the Board's practice has been to decline to apply section 1(4) and to indicate that if the union desires bargaining rights for the non-union employees it should seek to obtain them through the regular certification procedures. (See *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535.)

As may be seen from that quotation, the Board in *Evans-Kennedy* addressed the same three factors as were referred to in the Board's decision in *Stark Limited*, *supra*, on which respondent counsel is relying. In other words, where the Board is considering whether it should use section 1(4) to protect the existing bargaining rights of a trade union from being undermined by the transfer of work to a related non-union employer, the Board concerns itself with whether the applicant has acted promptly to protect its bargaining rights, whether there are employees whose rights under the Act will be interfered with by the application of section 1(4), and whether the applicant is seeking to avoid the certification procedures of the Act. In *Stark Limited*, the Board refused to issue a one-employer declaration because the applicant had not acted promptly on becoming aware of the threat to its bargaining rights and a declaration by the Board might unreasonably interfere with the freedom of choice of the employees who had worked all along for the non-union employer. In *Evans-Kennedy*, the Board went the other way, in part because the applicant had acted promptly to protect its claim to bargaining rights with one of the respondents. It is clear that each application was decided on its own particular facts.

31. The relevant facts in this application are that the applicant, as soon as it became aware of ATM's operations, acted to protect its bargaining rights under the Toronto Truck Agreement covering the employees of the Toronto Armoured Division. Ostrom, for the applicant, first sought to discuss with Brink's the relationship of the new work to the collective agreement. Apparently dissatisfied with the results, he sought next to have the issue of whether the work was covered by classifications in the agreement arbitrated under Article I of the agreement. Finally this application was brought by the applicant. These steps were taken within a two month period and had been

commenced immediately upon Ostrom learning that Brink's was operating from the Scarborough location. This application was made, in part, in order to clear the way for it to pursue arbitration under the provisions of Article I of the Toronto Truck Agreement. It is the applicant's position that, where the parties dispute the application of that agreement to the work being done by ATM employees it is a matter for an arbitrator to decide whether it is work coming within the applicant's bargaining rights under Article I. The applicant believed, probably correctly, that an arbitrator would not deal with the issue of whether ATM was a related employer bound to the Toronto Truck Agreement and, unless ATM could be shown to be bound to the agreement, the arbitrator would not be able to make any orders with respect to that company.

32. For reasons known only to Brink's, the applicant was not advised of the transfer of teller machine work from the Toronto Armoured Division to ATM and learned of it from its own sources only after the operations had been going on for some five or six months. While there was no evidence that Brink's had any reason other than a commercial one for transferring the teller machine work from the Toronto Armoured Division to ATM, having chosen not to advise the applicant, it hardly lies in the respondent's mouth to say that the applicant should be required to apply for certification to represent the employees hired by ATM for the performance of this work. While the Board is not without concern for the fact that the ATM employees hired since this application was made might not wish to be represented by the applicant or any trade union, the Board agrees with the statement in the *Evans-Kennedy decision, supra*, that their circumstances may be likened to those of employees hired as a result of a post-certification build-up of an employer's work force. Their interests are to be weighed against the need to preserve existing bargaining rights. Where the union has acted promptly, its existing rights normally are given priority and those established rights will govern until such time as the employees may wish to bring a timely application to terminate or displace those rights.

33. The Board is satisfied in these circumstances that the applicant is using section 1(4) to preserve its bargaining rights and not to expand them and has done so promptly.

34. With respect to respondent counsel's contention that a declaration under section 1(4) would have a disruptive effect on the way Brink's has organized its business operations because not all of the work being done by ATM's employees would fall under the collective agreement, the respondent has made its choice on how to organize its operations knowing that it was transferring work which it had previously recognized as being work coming within the scope of some of the classifications by which the bargaining unit in the collective agreement is described. While there may be circumstances where the Board would find it inappropriate to use section 1(4) to follow the bargaining rights from one employer to another related one because of the way in which the two employers have organized their businesses, the Board does not see the circumstances of this case as being grounds for letting Brink's decisions about its corporate organization overrule the use of section 1(4) to protect the applicant's bargaining rights.

35. Brink's claims that there has been no erosion of the applicant's bargaining rights respecting the Toronto Armoured Division employees because none of them have been laid off as a result of ATM's business. The Board has held that there can be erosion of bargaining rights without the loss of business and employment by the unionized employer. See the Board's decision in *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531. As the Board stated in that decision, the union's bargaining rights attach to the business; if the business expands and employees are added, the union's bargaining rights would encompass the new employees. In the *Kustom Insulation* decision, the Board found that the creation of a new, non-union employer, even though not competing for the same business as the unionized employer, was effectively carving out work which the unionized business might otherwise try and get. That was sufficient erosion of the union's bargaining

rights to cause the Board to declare that the two employers be treated as one for purposes of the Act. In the instant application, the facts are that some of the work previously done by employees of the Toronto Armoured Division is now done by employees of ATM. Had the work remained with the Toronto Armoured Division, it is reasonable to expect that there would have been an accretion to the applicant's bargaining unit. Therefore there has been an erosion of the applicant's bargaining rights which is directly attributable to the existence of ATM and the transfer to it of part of the work of the classifications falling within the bargaining unit of the Toronto Truck Agreement.

36. The Board is satisfied on all the facts of this application that the applicant was not seeking to expand its bargaining rights, rather it was seeking to prevent their erosion by the transfer of work from the Toronto Armoured Division bargaining unit to ATM. A declaration by the Board that Brink's and ATM be treated as one employer for purposes of the *Labour Relations Act* would serve to preserve the applicant's existing bargaining rights.

37. It is for all of these reasons that the Board found in its earlier decision that Brink's Canada Limited and A.T.M. Automatic Teller Machines Services, Ltd., are associated or related businesses under common control or direction and are to be treated as constituting one employer for purposes of the *Labour Relations Act*.

38. When the Board made that declaration, its decision was silent with respect to when the declaration was to take effect. Applicant counsel had requested in final argument that the declaration be made effective from the date of the application. The respondents were opposed to the declaration being made retroactive at all because, at the time of final argument, the collective agreement which had been in effect at the making of this application had been replaced by a new one. The Board's policy with respect to when a declaration under section 1(4) of the Act has force and effect is set out in its decision in *J.D.S. Investments Ltd.*, [1981] OLRB Rep. Mar. 294. The policy is that, unless the Board specifically directs otherwise, a declaration under section 1(4) has force and effect as of the time the associated or related activities or businesses began. That applies unless the Board states otherwise in its decision, although the Board has expressly limited the retroactive effect of its declaration in some cases. See for example the Board's decision in *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219. There is nothing in the facts of the instant application or in the conduct of the applicant in pursuing its bargaining rights that would cause the Board to limit the retroactive effect of its declaration beyond that which the applicant has stated it was prepared to accept. Therefore, the Board's declaration that Brink's Canada Limited and ATM Automatic Teller Machines Services, Ltd., be treated as one employer for purposes of the Act shall have effect from June 5, 1984, the date of making this application. The extent to and the manner in which the Toronto Truck Agreement which was in effect on that date applies to ATM's operations are matters for the parties to resolve or, if they are unable to resolve them, for an arbitrator appointed pursuant to the provisions of Article I of the Toronto Truck Agreement.

0438-86-R Independent Local 385, Applicant v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and its Local 385, and The United Food and Commercial Workers Union, Respondents v. **Coca-Cola Ltd.**, Intervener

Trade Union Status - Union Successor Status - Applicant claiming it is a successor trade union by virtue of disaffiliation with the respondent - Whether applicant disaffiliated with bargaining rights for intervener - Whether applicant is a trade union - Applicant found to have disaffiliated with its bargaining rights - Considerations with respect to establishing trade union status for new organizations inappropriate - Applicant Local was a trade union prior to disaffiliation and continues to hold its status as a trade union - Name of applicant at most a technical irregularity which cannot defeat a meritorious application - As applicant had not acquired bargaining rights by means of a transfer of jurisdiction, it is not a successor within the meaning of the Act - Application dismissed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

APPEARANCES: Paul Cavalluzzo, David Wagner, Richard Blair and Bob Hill for the applicant; E. G. Posen, G. Plenderleith and Paul Poirer for the respondent Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and its Local 385; Paul W. Timmins for the respondent The United Food and Commercial Workers Union; Henry Maeots for the intervener.

DECISION OF THE BOARD; May 4, 1987

1. The Board adds Coca-Cola Ltd. as an intervener to these proceedings.
2. This is an application under section 62 of the *Labour Relations Act* for a declaration that the applicant has acquired the rights, privileges and duties of its predecessor by reason of a merger, amalgamation or transfer of jurisdiction. That is, the applicant, Independent Local 385, claims that it is the successor trade union by virtue of a transfer of jurisdiction as a result of disaffiliation from the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers. The application solely concerns employees of Coca-Cola at 46 Overlea Boulevard and 81 Turnberry in Toronto; the applicant does not claim to represent Coca-Cola employees at 24 Fenmar Drive. The first named respondent (hereinafter referred to as the Canadian Brewery Workers or the National) and the second named respondent (the UFCW) oppose the application. The intervener employer took no position in the matter throughout.
3. In brief, the Canadian Brewery Workers, at a convention in January 1986, decided to merge with the UFCW. Local 385 opposed the merger and voted to disaffiliate from the Canadian Brewery Workers. The issue, in essence, is not whether the disaffiliation was proper but whether Local 385 disaffiliated with any bargaining rights. The applicant asserts that independent Local 385 acquired all the property, assets, contracts and bargaining rights of the Canadian Brewery Workers Local 385. The respondents submit that the Canadian Brewery Workers, not Local 385, held the bargaining rights in question and, hence, Local 385 "disaffiliated" without those rights. Further, the respondents contend that the applicant must prove its status as a trade union within the meaning of section 1(1)(p) of the act.
4. The Board heard *viva voce* testimony from six witnesses. A number of documents were tendered in evidence as well. The Board assessed the credibility of the witnesses according to the usual criteria, including the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly

their recollections, their demeanour while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances, the testimony of the witnesses and the documentary evidence are considered.

5. The Board notes that, in its view, there was relatively little actual conflict in the testimony of witnesses seeking to recall events, some of which occurred more than twelve years ago. In some instances, for example, witnesses were not actually present on the convention floor in 1974 in Winnipeg to hear particular speeches or explanations. On balance, the Board prefers the evidence of the applicant's witnesses in the few instances of conflicting testimony. Having weighed and assessed the relative credibility of the witnesses and the evidence both documentary and *viva voce*, the Board makes the following findings of fact.

6. It is necessary to elaborate somewhat on the historical background of the respondent National and its relationship to the applicant in these proceedings. The "International Union of Brewery Workers" (the International) was formed at the turn of this century following expansion of the "National Union of the Brewers of the United States" into Canada. In the years since then, the International was involved with a number of jurisdictional disputes with the Teamsters; the latter union succeeded in repeated raids of the American membership of the International. Finally, in November 1973, the "International" held a convention in Cincinnati, Ohio, to approve a formal merger with the Teamsters.

7. The merger, however, was not without vehement opposition by virtually the entire Canadian branch of the International. Prior to Cincinnati, several union officials in the Canadian branch met in Calgary and formed an "ad hoc committee" to seek a means of thwarting the proposed merger. The committee included P. O'Dowd (then business agent for Local 304), D. Wagner (then executive secretary of the Soft Drink Workers Joint Local Executive Board, the "Joint Board") and G. Plenderleith. The committee retained C. Thomson as counsel. Further, other counsel were retained locally, including C. Paliare, in Ontario. At the Cincinnati convention, the Canadian delegates participated up to the merger resolution itself and, when it was apparent their resistance was futile, walked off the convention floor. [The Board notes that, while it is convenient to refer to the opposition as consisting of the Canadian branch of the International, in fact, a few Canadian locals supported the merger, although some subsequently decided not to join the Teamsters.]

8. Immediately following the Cincinnati convention, a steering committee consisting of many of those on the *ad hoc* committee, including Wagner and O'Dowd, met in Toronto. On legal advice, the committee took the position that the "old" International had abandoned them, that the "Canadian Branch", in fact, constituted the "International". In particular, the committee relied on a provision in the International constitution providing that the organization could not be disbanded if at least three locals desired its continuation. This stance was taken, at least in part, to buttress the position of the Canadian branch in the inevitable jurisdictional and legal battles which would ensue with the Teamsters. It was decided to call a special convention in Winnipeg to officially "found" the Canadian branch as a separate entity from that which had merged with the Teamsters. The committee instructed Paliare to draft a new constitution for presentation at Winnipeg using the "old" International constitution as the framework with amendments as appropriate to reflect the new circumstances. Other necessary committees (e.g., credentials, resolutions, constitution) were struck in preparation as well.

9. The Canadian branch of the "old" International held its founding convention in Winnipeg in January 1974. A constitution was adopted derived from that of the "old" International with

several amendments, in particular, with the addition of a disaffiliation clause reproduced, in part, below:

ARTICLE XV - DISAFFILIATION

Right of Local Union to Disaffiliate

Sec. 1. Affiliation of Local Unions with the National Union is voluntary and the right of Local Unions, which are not part of a bargaining unit comprised of more than one (1) Local Union, to disaffiliate from the National Union at any time shall be inviolate irrespective of any other provision of this Constitution including the provisions of Article XIV, provided, however, that in any case of disaffiliation there shall be compliance with the following procedures and conditions.

• • •

(e) Upon disaffiliation in accordance with these procedures, the Local Union shall have no claim for monies paid to the National Union and the National Union shall have no claim upon the assets, funds, contracts, bargaining rights or other properties of the Local Union.

In this regard, it should be noted that the phrase “bargaining rights” was added to the original version prepared by Paliare and approved on the convention floor. The transcript of the convention proceedings was tendered in evidence. O’Dowd was elected president and Wagner as secretary-treasurer.

10. The legal and jurisdictional disputes between the Teamsters and the “new” International, the entity which emerged from the Winnipeg convention, arose as anticipated. The wrangles included attempted Teamster “raids” on several Ottawa locals of the “new” International, disputes over various assets, use of the “International” name, etc. The parties, however, succeeded in negotiating a full settlement of all their disputes. That settlement, in which Wagner, Thomson and Paliare were involved, is set out in *Coca-Cola Ltd.*, [1975] OLRB Rep. Nov. 862 and is excerpted below:

6. The Brewery Workers acknowledge the present status as bargaining agents, and the validity of the present bargaining rights held by all Locals or former Locals of the Brewery Workers who are not opposed to the merger or who are now affiliated with the Teamsters as well as the succession of all of their bargaining rights under collective agreements and otherwise to the Teamsters, and agree that they will not directly or indirectly attack or bring the same into question in any proceedings in any Court, Labour Board or other Tribunal, and that they will not, during the lifetime of any agreement, seek to displace any such Local as bargaining agent.

7. The Teamsters acknowledge the present status as bargaining agents, and the validity of the present bargaining rights, whether under collective agreements or otherwise, held by the Locals remaining affiliated with the Brewery Workers, including those of the Brewery Workers Provincial Joint Board and its constituent Locals, and agree that they will not directly or indirectly attack or bring the same into question in any proceedings in any Court, Labour Board or other Tribunal and that they will not, during the lifetime of any agreement, seek to displace any such Local as bargaining agent.

8. Apart from their respective obligations concerning this settlement, the parties do hereby release, remise and forever discharge each other and the respective officers and members of each other, and their respective executors, administrators, successors and assigns, from all actions, causes of actions, damages, claims and demands whatsoever which they ever had now have or which they, their executors, administrators, assigns or successors hereafter may have against each other or their respective officers and members by reason of or rising out of the Merger/Affiliation Agreement of September, 1973, or the adoption thereof at the convention of the International of the Brewery Workers at Cincinnati on November 6th, 1973, as well as the actions taken by the Brewery Workers at the Convention in Winnipeg on January, 1974, and all

and every action and Proceeding and things done by the parties as a consequence of the foregoing.

Pursuant to the settlement, as well, the "new" International changed its name to the "Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers" (the "National") in June 1975.

11. Over the years, several locals exercised their right to disaffiliate. For example, in 1984, Local 304 successfully disaffiliated from the National (see *Kwik Lok Ltd.*, (1986) Board File No.0760-85-R, unreported, January 14 and 24). Several locals in the Maritime provinces also disaffiliated, including Locals 351, 353 and 355 in Newfoundland and Locals 362 and 701 in New Brunswick. More than one unsuccessful attempt was made at various conventions over the years to substantially alter the disaffiliation article to impede or preclude that right.

12. At the Halifax convention in 1984, the question of a merger was raised. At that point, article XVI, section 3 dealt with the impact of a possible merger as follows:

Sec. 3. In the event that the National Union concludes and ratifies a merger with a larger organization, such merger shall not bind any Local Union which votes against the merger. In the event a Local Union votes against the merger, the Local Union shall be deemed to have disaffiliated from the National Union and from any Successor Union and neither the National Union nor any Successor thereto shall have any claim upon the assets, contracts, bargaining rights or other properties of the Local Union.

At that stage, Local 385 and the Joint Board (see paragraph 13, *infra*) opposed any mergers but the matter did not come to a vote. The issue remained very much alive, however, and in late 1985, the Joint Board had come to favour a merger.

13. It is useful now to place the applicant and other Ontario soft drink locals in this historical context in more detail. Wagner was instrumental in the formation of Local 385 in 1968. When the employees of the intervener were organized, the certification application was in the name of the International for reasons of convenience at the time. Shortly thereafter, the Joint Board was created to facilitate organizing in the soft drink industry, provide servicing assistance to the member locals as needed and conduct joint bargaining in the industry. The Joint Board consisted of representatives of the member locals (including the presidents/chairs of the member locals) and a full-time officer, the executive-secretary. While bargaining was conducted by the Joint Board, contract proposals were generated by the member locals. Ratification votes were conducted at the local level as well, although the ballots themselves were pooled before counting with those of all member locals. The resulting collective agreements, though, were signed separately. The "National" endorsed the contract proposals and generally signed the collective agreements but usually did not otherwise become involved in the negotiations. It should also be noted that the day to day administration of the collective agreements was conducted by the locals themselves. The Joint Board was involved at Step 3 of the grievance procedure and approved forwarding the grievance to arbitration. The locals did retain the authority to direct a grievance to arbitration notwithstanding a negative decision by the Joint Board; if the local was successful at arbitration, it was reimbursed by the Joint Board for the costs involved. Local 385 participated in the Joint Board from the inception of that structure as did most Ontario locals in the soft drink industry. Local 278, though, as a "composite local" was not a Joint Board member but did bargain together with the Joint Board.

14. A convention was called for January 1986 in Toronto to resolve the question of merger. Notwithstanding continued vigorous opposition by Local 385, a merger of the National with the UFCW was approved. One of the resolutions adopted dealt with the process of disaffiliation. That is, a local voting against a merger at the convention was considered to have *initiated* disaffiliation

proceedings. To successfully disaffiliate, a majority of the members of the local had to vote, by secret ballot, in favour of disaffiliation at a subsequent meeting called by the National. The National (or its successor) was entitled to fully participate in that meeting and approve the voters/membership list.

15. W. Lumsden (then secretary-treasurer of the National) convened a meeting of Local 385 members on March 1, 1986 pursuant to the terms of the resolution just noted. Lumsden and two officials from the UFCW spoke against disaffiliation; R. J. Hill (president, Local 385) spoke in favour. Other persons who wished to speak on the issue were permitted to do so. The vote was 258 to 14 in favour of disaffiliation, more than necessary to satisfy the disaffiliation requirement. Lumsden wished the Local well and offered assistance in the future if the Local so desired.

16. Following that meeting, the minutes book, bank account and financial records were transferred to Local 385's possession. On April 7, 1986, though, C. Evans (a senior official with the UFCW) advised the Local 385 executive that the UFCW considered that the National held the bargaining rights and, hence, Local 385 had disaffiliated without any bargaining rights whatsoever. The Local 385 executive informed the Local membership of the UFCW position and the executive's decision to retain counsel and file a successor application with the Board. The membership concurred and the instant application was filed on May 12, 1986.

17. Since the March 1 vote, Local 385 has continued to administer the collective agreement, although the Local and the UFCW have agreed to consent jointly to the referral of grievances to arbitration pending the outcome of these proceedings. In the interim, as well, the employer has held the dues in a trust fund. The "old" Local executive continued virtually extant. A constitution and bylaws for the Local were drafted, essentially as revisions to the National constitution and "old" Local 385 bylaws reflecting the fact of disaffiliation. At the regular meeting in October 1986, officers were nominated for the various positions. Notices of a special meeting to be held on October 18 were posted along with copies of the draft constitution and bylaws. At that meeting, the draft constitution was read, discussed and approved to be submitted to a further vote (as required by the procedures). The meeting was attended by seventy-three persons, thereby, constituting more than a quorum and minutes kept. At the next regular meeting on November 1 at which there was also a quorum and minutes kept, the financial statements were approved and the draft constitution and bylaws adopted unanimously. As well, the name change to Independent Local 385 was formally approved and the new oath taken by all Local members present.

18. The arguments of counsel are next set out in a highly abbreviated form.

19. Counsel for the applicant argued that the applicant was entitled to a declaration under section 62 of the Act on three separate bases: (a) that the bargaining rights had been transferred to Local 385 by the International after Local 385 was chartered or at least from the 1974 Winnipeg convention and, thus, the applicant retained its bargaining rights on disaffiliation as it remained the same entity; (b) the same analysis as in (a) but, if independent Local 385 was a new entity, that Local 385 transferred its bargaining rights to that new entity on disaffiliation; (c) that, if the National held the bargaining rights, those rights were transferred to the applicant upon successful disaffiliation. Counsel referred to a number of provisions in the National constitution supporting his assertion that local autonomy was the foundation of that organization, including the "unique" disaffiliation provision. The other documentary evidence, including the constitution of the Joint Board, the local bylaws, the settlement with the Teamsters, the applicant's constitution and bylaws were likewise analyzed. Counsel reviewed the *viva voce* evidence in detail, submitting that the evidence of Hill and Wagner should be preferred where in conflict with the testimony of the respondent's witnesses, especially in view of the central role played by Wagner in events surrounding the

formation of the National and of Local 385. Several cases were cited in support: *British Columbia Ferry and Marine Workers' Union and British Columbia Government Employees Union and B.C.G.E.U. Marine Services - Licensed Component*, [1977] Can LRBR 17; *The Hydro-Electric Commission of the City of Hamilton* (1962) 63 CLLC ¶16,261; *National Bank of Canada, Sillery, Quebec*, [1982] 2 CLRBR (NS) 202; *Kwik Lok Ltd.*, *supra*. In reply, counsel asserted the date of the application, that is, before the change of name to "Independent Local 385" had been formally approved by the membership, was not fatal to the application given the continued existence and operation of the Local following disaffiliation. Further, counsel submitted the Board jurisprudence dealing with status in certification applications was not analogous. It was stressed that the Teamsters settlement transferred or recognized the jurisdiction of the locals only, not of the "new" International and the Board decision in *Coca-Cola Ltd.*, *supra*, confirmed the "new" International (by that point, the National) was a separate entity. Finally, counsel emphasized that, to accede to the arguments of the respondent and intervener, would result in the absurd situation wherein, despite the fact that not a single person in the bargaining unit was a member of the UFCW, that union held the bargaining rights.

20. Counsel for the respondent UFCW reviewed the evidence with reference to his assertion that the applicant must establish its status as a trade union and had failed to do so. Specifically, the applicant had not taken the appropriate steps to create a new entity which could be regarded as a trade union under the Act. Further, it was asserted there was no evidence indicating how, when or why bargaining rights had been transferred to the Local and, as the National's name was still on the collective agreements, that body held the bargaining rights. The National had acquired those bargaining rights as a result of the Teamsters settlement or through voluntary recognition at the point the first collective agreement was signed following the Winnipeg convention. Cases cited in support included: *Island Park Food Mart Ltd. (Re) Goldstein IGA*, [1970] OLRB Rep. Nov. 838; *Famous Players Limited*, [1982] OLRB Rep. July 1011; *Bartlett Transport Ltd.*, [1984] OLRB Rep. Feb. 168; *City of Mississauga Public Library Board*, [1975] OLRB Rep. Oct. 788.

21. Counsel for the respondent National adopted the submission of counsel for the respondent UFCW and stressed that, as at the application date, Independent Local 385 did not exist. As a consequence, the application must be dismissed as premature. Counsel conceded Local 385 had trade union status but asserted the gap between Local 385 and Independent Local 385 was not a technical deficiency but a fundamental flaw. Counsel reviewed specific provisions of the constitution and the evidence in support of his position that the National held the bargaining rights and that disaffiliation did not transfer those bargaining rights to the local given the wording of article 15(1)(e) of the constitution. Apart from an express transfer from the predecessor to the successor, an event which counsel argued had not occurred here, it was submitted that the constitution provided the bargaining rights remained with the National, now the UFCW, and that this result was not absurd. Counsel contended the intent of article 15(1)(e) was clear, namely, that the locals on disaffiliation "took what they had" and, in the case of Local 385, that did not include the bargaining rights. It was submitted the applicant bore the onus of proving successorship and had not met that onus. Further, even if the Board found the applicant to be a trade union within the meaning of section 1(1)(p) of the Act, successor rights did not flow as a consequence. That is, counsel argued that the applicant was not entitled to a declaration of successor status. In support, counsel referred to the following cases: *City of Mississauga Public Library Board*, *supra*; *Bartlett Transport Ltd.*, *supra*; *Creeds Storage Ltd.*, [1985] OLRB Rep. Feb. 238; *Canadian Rexall Corporation*, [1976] OLRB Rep. Sept. 557; *International Union of Operating Engineers, Local 793*, [1979] OLRB Rep. Aug. 789; *The Resilient Floor Workers Union, Local 2965, Confederation of National Trade Unions*, [1967] OLRB Rep. Feb. 895; *Municipal Tank Lines Limited*, [1973] OLRB Rep. June 363.

22. As noted in paragraph 2, the parties acknowledge that Local 385 properly disaffiliated from the National. What is vigorously contested is whether Local 385 disaffiliated with the bargaining rights so that the applicant may properly claim to represent the employees of the intervener employer at Overlea and Turnberry locations and whether the applicant is a trade union within the meaning of the Act given that the applicant has sought a section 62 declaration in the name of "Independent Local 385". The Board intends to deal first with the question of bargaining rights and to do so must have regard to the historical relationship of Local 385 and the National.

23. The events leading up to and including the founding convention in Winnipeg are described in paragraphs 6 - 9, *supra* and need not be repeated in their entirety here. However, to use a political analogy, it is difficult to depict those events as other than a revolution by the Canadian Branch of the International. When efforts to prevent the merger with the Teamsters appeared certain to fail, the Canadian Branch walked out of the Cincinnati convention to establish a new organization. It is accurate to state that the new organization sought to clothe itself with legitimacy by taking the position, on legal advice, that the "old" International had abandoned them, that the "Canadian Branch" in fact, constituted the International and that there was a "constitutional" basis for that stance in the clause in the International constitution providing that the organization could not be disbanded if at least three locals desired its continuation. Necessity for an adjudication of the claim to constitutional legitimacy of the "new" International, as contrasted with the "old" International which merged with the Teamsters, was precluded by the agreement between those two organizations which fully and finally resolved all matters in dispute between them (see paragraph 10 above). Quite simply, the "revolution" by the Canadian Branch succeeded. Those who walked out of Cincinnati, following the Winnipeg founding convention *and* in accordance with the terms of settlement with the Teamsters, established a new union, the "National". The *de facto* "new" International became the *de jure* National.

24. In determining the "locus" of the bargaining rights for the affected employees, then, it is necessary to examine both seminal documents, namely, the constitution adopted at Winnipeg and the settlement with the Teamsters, and the historical context. It is acknowledged that the original certification by the Board in 1968 for the affected employees was in the name of the International. It is also clear that the subsequent formation of the Joint Board did not affect those bargaining rights. The constitution of the Joint Board merely empowered that body, *inter alia*, to negotiate on behalf of the member locals with respect to collective bargaining. In the Board's view, either Local 385 held the bargaining rights at the time of the Winnipeg convention *or* Local 385 did not hold those bargaining rights in January 1974 but acquired them following the settlement with the Teamsters. In either circumstance, the Board does not consider that the organization referred to as the "new" International and later as the "National" ever obtained the bargaining rights in respect of the employees affected by this application.

25. It is appropriate to elaborate somewhat on this conclusion. The constitution adopted at the Winnipeg convention in January 1974 was born of the unhappy experiences at Cincinnati, of the frustration of the Canadian Branch which unsuccessfully sought to persuade the "old" International to refuse a merger with the Teamsters. The founders of the "new" International were determined to prevent a repetition. That is, the "new" International was to be grounded in the autonomy of the member locals. The hallmark of the new organization was voluntariness and the right of the member locals to disaffiliate was sacrosanct (see paragraph 9 *supra* wherein article XV, section 1 of the constitution is cited). Article 15(1)(e) expressly confirmed that, upon disaffiliation in accordance with the appropriate procedures, the National "shall have no claim upon the assets, funds, contracts, bargaining rights or other properties of the local". The Board regards the addition of the phrase "bargaining rights" to the original draft of that section and the transcript of the Winnipeg proceedings as further confirmation that the National was not intended to usurp or

encroach upon the autonomy of the member locals with respect to matters critical to that autonomy such as assets, funds, contracts, bargaining rights and other properties. Wagner's testimony, which the Board accepts, is to the same effect. The sole exception (which is not relevant here) addressed circumstances where an established bargaining unit was composed of more than one local, in which case all of those locals were required to disaffiliate (article 15(1) and (2)). In reality, that exception dealt with the Brewery workers group in Ontario which was party to a master collective agreement covering some fourteen locals and over twenty branch units. Obviously, in the formation of any umbrella organization there is some ceding of power from the membership. That is inherent in the concept of "affiliation". However, it is clear that the intention of the constitution was to provide a framework for member locals to achieve common objectives without thereby rendering nugatory the "inviolable" right of the members to disaffiliate. This philosophy permeates the constitution. The Board has noted article XV(1)(e) but other examples could be given.

26. The other seminal document is the settlement with the Teamsters which finally resolved all disputes between the "old" International (which had merged with the Teamsters by that date) and the "new" International. As noted earlier, that settlement is set out in *Coca-Cola, supra*, and excerpted in paragraph 10 above. Item 7 of that settlement specifies that the Teamsters "acknowledge the present status as bargaining agent, and the validity of the present bargaining rights, whether under collective agreements or otherwise, held by the Locals" remaining affiliated with what has been referred to as the National. This document can only be construed as confirming bargaining rights already held by the breakaway locals or an abandonment of bargaining rights by the Teamsters in respect of those breakaway locals in the expectation that the locals would acquire those rights. The document makes clear that, thereafter, the Teamsters retained no rights or claims *vis-a-vis* the breakaway locals.

27. The Board need not conclusively determine whether the breakaway locals held the bargaining rights prior to the settlement with the Teamsters. Since that time, for over a decade in fact, the employees affected by this application have been governed by successive collective agreements. The Teamsters, in their settlement, abandoned any bargaining rights in respect of the employees of the intervener. The only reasonable interpretation of the continuance of the collective bargaining relationship is that the applicant local was accorded voluntary recognition by the intervener, at the latest in consequence of the settlement with the Teamsters, and, given the expiry of the one year period referred to in section 60 of the Act, acquired bargaining rights in respect of those employees. When the historical events and the settlement with the Teamsters are considered together, however, it is clear that the *National* could *not* have acquired those rights. As noted in paragraphs 6 - 9, 23 and 25, *supra*, the *raison d'être* of the National was local autonomy. Article XV, section 1(e) of the constitution, for example, is consistent with that conclusion, as is the testimony of Wagner. While it is correct to note that the National appears as a party to the collective agreements and National officials generally have signed those collective agreements, in the Board's view, on the evidence, including the transcript of the Winnipeg convention and C. Thomson's comments in particular, the inclusion of the National as a party on the collective agreements was always intended to be a matter of form and not substance.

28. Thus, at the time of disaffiliation, Local 385 left the National in conformity with the procedures established under the constitution and disaffiliated with its assets, funds, contracts, bargaining rights and other properties. Parenthetically, it should be noted that this analysis is supported as well by the complete absence of any reference that Local 385 would depart without bargaining rights when disaffiliation was a real possibility, i.e., in the period from January 1986 to the March 1986 disaffiliation meeting. It is inconceivable that, in the context of the National seeking to dissuade the Local from disaffiliating, particularly at the March 1 meeting itself where Lumsden (for the National) and two UFCW officials spoke in favour of the merger with the UFCW, there

would be no mention of the "fact" (subsequently asserted) that the Local would have left without its bargaining rights if such had been the view of the National.

29. There remains to be considered the issue of the name of the applicant and its status as a trade union within the meaning of the Act as at the application date of May 12, 1986. The respondents contend that the application is premature or fatally flawed because the application is in the name of Independent Local 385 whereas that name was not formally approved, along with the revised constitution and bylaws until November 1, 1986. In the Board's opinion, the decisions in *Famous Players Limited*, *supra*, *International Union of Operating Engineers*, *supra*, and *Canadian Rexall Corporation*, *supra*, are simply not analogous to the instant case. Nor are the considerations which shape the Board's jurisprudence with respect to establishing trade union status for new organizations appropriate: *City of Mississauga Public Library Board*, *supra*. In the instant case, Local 385 was clearly a trade union within the meaning of section 1(1)(p) of the Act prior to disaffiliation and that organization disaffiliated in compliance with the National's constitution. Following disaffiliation, the Local continued to administer the collective agreement (although both it and the National/UFCW consented to arbitration referrals), its officers continued to function, meetings of the executive and the membership continued to be held as usual. Obviously, the references to the National in the constitution, the local bylaws and the Local's name had become meaningless as a result of disaffiliation. The Local acted expeditiously and methodically in the circumstances in reviewing the constitution and bylaws and adopting those revised documents at the membership meeting in November (see paragraph 17 above). The Board does not consider that there was a fundamental change in the organization sufficient to affect its status as a trade union: *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517; *Food Corp. Limited*, [1983] OLRB Rep. May 636. Quite simply, Local 385 was a trade union when affiliated to the National and, having properly disaffiliated, retained that status: *Kwik Lok Ltd.* (January 14, 1986) *supra*; *The Hydro Electric Power Commission of Ontario* (1957), 56 CLLC ¶18,080; *Navco Food Services Limited*, [1971] OLRB Rep. Feb. 80.

30. In the Board's view, in these circumstances, the name of the applicant as Independent Local 385 is at most a technical irregularity which should not be permitted to defeat a meritorious application: s.114 of the Act. The extraordinarily technical nature of the respondent's argument may readily be illustrated. On that reasoning, having applied as Independent Local 385, the applicant should have sought leave to amend the style of cause (which would undoubtedly have been granted) to Local 385 or Local 385 with the reference to the organization with which it had been affiliated. Then, following formal approval of its "new" name in November 1986, the applicant should have sought another amendment to indicate Independent Local 385 in the style of cause. In the circumstances, this too would have been granted. Throughout, however, there would have been no doubt amongst the parties as to the organization applying to the Board. Thus, the characterization of the applicant's name as at most a technical irregularity is eminently reasonable. Further, having heard the evidence and argument over a period of five hearing days, the Board does not regard it as conducive to sound labour relations to require a new application be filed and the matter re-heard.

31. Having regard to the foregoing, the Board concludes that this application should be dismissed. The applicant has held the bargaining rights in respect of the intervenor's employees for well over a decade. The applicant retained those rights upon disaffiliation. Moreover, disaffiliation did not constitute a fundamental change in the organization sufficient to affect its status as a trade union within the meaning of the Act and its identity as an organization has continued unchanged apart from its formal name. The applicant has held the bargaining rights for the employees affected by this application for a considerable period and continues to hold those rights at present. Thus, the applicant Independent Local 385 has *not* acquired the rights, privileges and duties of its pre-

decessor *by reason of* a merger or amalgamation or transfer of jurisdiction. The applicant is not a *successor* within the meaning of the Act to the trade union which held bargaining rights for the affected employees. The applicant is the very entity which held and continues to hold those rights.

0876-86-M The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Applicant v. Comstock International Ltd., Respondent

Construction Industry Grievance - Discharge - Discharge of employee who left job site without permission - Analysis of principles of progressive discipline and just cause in the construction industry - Five day suspension substituted for discharge

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *J. A. Ronson* and *D. Patterson*.

APPEARANCES: *Paul W. Timmins*, *Reg White*, *Doug Sullivan* and *Frank Lily* for the applicant; *G. Grossman* and *R. Delaney* for the respondent.

DECISION OF KEN PETRYSHEN AND D. PATTERSON; May 29, 1987

1. The name of the respondent is amended to read: "Comstock International Ltd."
2. This is a referral of two grievances to the Board pursuant to section 124 of the *Labour Relations Act*.
3. Mr. Doug Sullivan was discharged for an incident which occurred on April 10, 1986 at the SWARU project in Stoney Creek. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (the "union") filed a grievance dated April 18, 1986, challenging Sullivan's discharge. Shortly after the discharge, the union dispatched Sullivan back to the SWARU project. A representative of Comstock International Ltd. (the "employer") refused to re-hire Sullivan, which caused the union to file a second grievance on Sullivan's behalf dated April 28, 1986. Both of these grievances are before us but, as will become evident, the Board only need deal with the discharge grievance dated April 18, 1986.
4. Counsel for the employer called as witnesses O. Churchill, superintendent, K. Bosch, foreman, and R. Delaney, project estimator. Counsel for the union called D. Sullivan, F. Lily, steward, and R. White, assistant business manager, to give evidence in support of the discharge grievance. Having weighed and assessed the evidence, including the credibility of the witnesses, the Board makes the following findings of fact.
5. Sullivan, a boilermaker, began to work for the employer on the SWARU project on January 24, 1986 and, for the most part, he worked as a welder. By the time the hearing in this matter concluded, the project was virtually completed. Prior to the incident of April 10 which led to the discharge, two events occurred which counsel for the employer argued are of some relevance.
6. On March 11, 1986, Sullivan did not report for work. Churchill called Sullivan at home and was informed by Sullivan that March 11 was his birthday and that he does not work on his

birthday. Churchill instructed Sullivan to ensure that he was at work the next day and Sullivan complied. In cross-examination, Sullivan admitted he was told by Churchill that he would be replaced if he did not report for work the following day and that Churchill's concern about his absence and his direction to report to work on March 12 indicated to him the importance of the schedule on a construction project. Although Sullivan was not disciplined for his absence on March 11, counsel for the employer argued that the incident should have made Sullivan aware of the importance the employer generally placed on attendance and timekeeping.

7. The second event occurred on April 9, 1986. The steward, Frank Lily, left the job site in order to drive White back to the union office. Lily did not advise management that he was leaving the project and, at some point, Churchill became aware of his absence. At the completion of the shift on April 9, Churchill addressed the employees for a few moments, with Sullivan present, as they were preparing to leave for the day. While there is some conflict in the evidence regarding precisely what Churchill said to the employees, there is no doubt that Churchill advised employees that an employee was required to inform management of his desire to leave the job site. Churchill also may have indicated that an employee was required to obtain permission to leave from management prior to leaving the job site. In our view, even if Churchill did not explicitly give the latter instruction, such an instruction is implicit in the direction to advise management of an intention to leave the job site. Once an employee approaches a person occupying a managerial position expressing an intention to leave, one would expect an interchange between the two in which the employee conveys a reason for wanting to leave and the management person conveying a decision to either permit or deny the employee's wishes. Counsel for the employer argued that Churchill clearly conveyed to the employees what was expected of them during the meeting on April 9.

8. On April 10, Sullivan, who until that day had been working primarily inside the plant on boiler modification, was assigned by Bosch, the foreman, to work with Lily on the No. 1 spray cooler on the roof. The evidence and the manner in which the case was argued indicate that, as a foreman, Bosch was one of management's representatives on the job. Sullivan testified that at approximately 8:00 a.m. he advised either Bosch or the other foreman, Mr. Roy, of the possibility that he would be leaving work early that day. Bosch, who testified before Sullivan, strongly denied that Sullivan gave him any advance notice that he possibly would be leaving early when the suggestion was put to him in cross-examination. Lily did testify that earlier in the day Sullivan mentioned something about leaving early, but there is no indication in his evidence that Sullivan's comment was directed to or could have been heard by a foreman. Although Roy did not testify, we cannot accept Sullivan's evidence on this point. Given that the matter is one of some importance, one would have thought that Sullivan would have had a clearer recollection of which foreman he advised of his possible departure. We are satisfied that Sullivan did not convey to anyone in management in a proper manner the fact that he might leave the job site later that morning.

9. On April 10, during his 9:30 a.m. coffee break, Sullivan made a telephone call and, based on information he received during that call, he decided, at approximately 10:15 a.m., to personally attend an appointment. The evidence does not disclose the nature of the appointment or why Sullivan felt it imperative to attend. Sullivan climbed down from the roof, asked some other employees if they knew where Bosch was and, based on their information, he headed for the office trailer. As he was approaching the trailer, he met Bosch returning from the trailer. Sullivan briefly indicated to Bosch that he was leaving the job site, without giving a reason and without requesting permission to leave. Bosch did not make any verbal response and, although Sullivan testified that Bosch "kind of nodded", we are satisfied that Bosch did not make any gestures from which Sullivan reasonably could have concluded that he had the foreman's consent to leave. Sullivan proceeded to a trailer where he changed and drove off the job site.

10. Two matters are worth noting. Counsel for the employer called some evidence with a view to suggesting that Sullivan left the job site because of a safety concern or because he was not happy with the prospect of working outside on the roof for the entire shift. These suggestions are not established by the evidence before us. There is nothing before us from which the Board can infer that Sullivan left the job site for a reason other than the one Sullivan gave. Secondly, the union called some evidence which attempted to demonstrate that Bosch and Sullivan were not on the best of terms. Based on this evidence, we are satisfied that the working relationship between Bosch and Sullivan was strained to a degree. Their relationship may explain, to some extent, the nature of their conduct when Sullivan advised Bosch he was leaving the job site.

11. Bosch advised Churchill of Sullivan's departure. After attempting to contact Sullivan at home and after discussing the matter briefly with Bosch and Lily, Churchill decided to lay Sullivan off. A lay-off in these circumstances in the construction industry in effect amounts to a discharge. Churchill called the union hall in order to obtain another welder and eventually spoke to White. When he was advised that the employer had decided, in effect, to terminate Sullivan's employment, White insisted that Sullivan be discharged, not laid-off, and he told Churchill that the union would be filing a grievance. The employer complied with White's wishes and discharged Sullivan for walking off the job without requesting permission and without giving a reason. On April 11, Sullivan reported for work and was advised for the first time that he was discharged.

12. Bosch testified that he was able to direct another employee to complete Sullivan's assignment of April 10 and that there were no other problems in getting that assignment completed. Although both Sullivan and White admitted it generally was important to keep on schedule on a construction project, both testified that by April 10 the welding work was not crucial at that point in the project's development. This evidence was uncontradicted.

13. Counsel for the union attempted to prove that Churchill, at some point in the afternoon of April 10 after he had decided to lay-off Sullivan, and after discussing the matter with White, reversed his position and advised White and Lily that Sullivan could return to work on April 11. In addition, the union attempted to prove that Churchill changed his mind again on April 10 in favour of discharging Sullivan after Bosch made it clear to Churchill that if Sullivan was not discharged, Bosch would quit. Counsel for the employer objected to this evidence firstly on the basis of its relevancy and subsequently on the basis that a privilege was attached to the settlement discussions between the employer and union representatives. The Board orally ruled at the hearing, Board Member J. Ronson dissenting, that it would admit the evidence. The majority of the panel was of the view that the results of those discussions, even though they occurred subsequent to the discharge, arguably could be relevant. In reviewing the evidence of the union and employer witnesses relating to these matters, we are satisfied that in the circumstances of this case, even if we were to make the factual determinations as suggested by the union, it would not affect our disposition of the discharge grievance.

14. Counsel for the union argued that Sullivan's discharge was "not for just cause" and, consequently, that it was contrary to subsection 3:03 of the collective agreement. That subsection reads as follows:

3:03 It is an exclusive function of the Employer to hire, promote, demote, transfer, suspend, lay off, discipline or discharge for just cause, employees in the bargaining unit, subject to the provisions of this Agreement.

Based on this violation, the union requested an order directing the employer to fully compensate Sullivan for his losses. Alternatively, we were urged by the union to exercise our discretion under section 44(9) of the Act to substitute a penalty if we found Sullivan was guilty of some misconduct.

15. Counsel for the employer argued that we should dismiss the grievance. In his view, the birthday incident and Churchill's instructions to the employees on April 9 alerted Sullivan to what was expected of him and warned him that a failure to meet his obligations in this regard would result in serious consequences. On April 10, counsel contended that Sullivan left the job without obtaining permission and without giving any reasons. Given the nature of the employment relationship in the construction industry, counsel argued that Sullivan's misconduct on April 10 was sufficient to warrant discharge.

16. This is not the first occasion where the Board, acting as arbitrator, has been asked to adopt an approach which recognizes that there are aspects of the construction industry which impact on the standard of just cause in matters of discipline. The Board's response to such a suggestion is reflected in the following comments in *Canadian Engineering and Contracting Co. Ltd.*, [1983] OLRB Rep. July 1017 at paragraph 11:

11. We accept, of course, that the employer-employee relationship in the construction industry is not a close one, and is not comparable with relationships that arise between employers and their employees in an industrial setting. Employment relationships are transitory and, as in the present case, workers will be referred from the hiring hall and employed for short periods of time without the kind of pre-selection which would be undertaken by an industrial employer before engaging workers who could conceivably be employed on a long-term basis. Accordingly, we accept the need for a certain amount of realism and arbitral restraint in determining what constitutes just cause for discharge in a construction context. However, we are not persuaded that either the arbitral jurisprudence or the language of the collective agreement before us requires us to apply considerations that are *totally different* from those applied by arbitrators to employers who use the same language in collective agreements in other industries. In particular, the Board is of the view that the employer must at least warn a grievor that his job is in jeopardy prior to discharging him for "unsatisfactory performance" - which is what we found has happened in the circumstances of this case. In *Re Harold R. Stark Limited et al.* [1972] 1 L.A.C. (2d) 406 (Egan), the majority of the Board observed (at pages 406-407);

It was argued by the company that because of the special nature of the construction industry, different considerations ought to apply with respect to the discharge of employees to those obtaining in industry in general. In this regard, it is of some significance to note that the grievors are not in the position of long-term employees whose previously acceptable work performance has deteriorated. The grievors were assigned to the company by the union under the terms of the collective agreement. That is, of course, an arrangement quite common in the construction industry. In consequence of this practice, the grievors were taken on without any pre-hiring or qualifying interview such as might enable the company to make a pre-employment assessment. They entered into the employment of the company purporting to be competent tradesmen and were not subject to any probationary period of evaluation by the company. Therefore, there is no question of any knowledge, on the part of the company, as to the proficiency of the grievors at the time of their engagement as tradesmen qualified in the classifications which they hold.

We are not wholly persuaded, however, that totally different considerations from those applied to industry in general are applicable to discharge cases in the construction industry. In this connection, our attention was drawn to *Re United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 221, and Fraser-Brace Engineering Co. Ltd.* [1968], 19 L.A.C. 258 (Christie). This case involved the question of the discharge of an employee for "loafing" on a construction site. The company, in that case, argued that different considerations applied to discharge in the construction industry. The Board, in its decision in that case, stated that it was not unimpressed by the argument that rather different considerations may apply in the determination of what constitutes just cause for dismissal in the construction industry.

The grievor in the *Fraser-Brace* case, *supra*, appears to have been a chronic time

waster, but received no admonitions from the company with respect to his conduct prior to his discharge. The Board went on to say, however, that "It is unnecessary to decide what differences it makes that we are dealing with the construction industry. Even if the requirements of 'cause' and just cause were considerably lower than they are in general industrial situations 'cause' for dismissal was not established here". The Board went on to find that the discharge was unjust because of the absence of a warning and reinstated the grievor.

See also *Proweld Company Limited*, [1982] OLRB Rep. March 437, and *White and Greer Company Limited*, Board File No. 1404-81-M, decision dated November 23, 1981, unreported, in which this Board confirmed that prior to the discharge of an employee in the construction industry for lack of production or inadequate quality, the employee is entitled at least to a warning that the employer is dissatisfied.

We adopt these observations in our consideration of the matter before us. We note that the construction project in this case extended over a relatively long period, approximately ten months, and that Sullivan's connection with it was expected to be of significant duration. The longer an employee has worked and is expected to work on a construction project, the more likely an arbitrator will apply considerations which pertain to industry in general when assessing whether an employer has established cause for discharge.

17. We are satisfied that Sullivan approached Bosch on April 10 for the sole purpose of advising Bosch that he was leaving. Sullivan did not intend to provide Bosch with a reason for leaving, nor did he intend to seek the foreman's permission to leave. In his evidence, Sullivan candidly admitted that he did not feel he had an obligation to obtain permission or to provide a reason. We do not agree. Even if Churchill on April 9 simply said that an employee was obliged to advise management when he was going to leave, it would be unreasonable for an employee to conclude that a simple announcement of an intention to leave work would satisfy his obligations to his employer. In a situation such as this, Sullivan was obligated to seek permission to leave and to provide a reason for the absence, if requested. Sullivan failed to meet his obligations to the respondent on April 10 and, accordingly, we find that the respondent had cause to impose some discipline on Sullivan for his conduct on that date. We have concluded that, in the circumstances of this case, mere silence on the part of the foreman would not have provided Sullivan, acting reasonably, with an indication that he had the foreman's permission to leave.

18. Although we are satisfied that Sullivan's conduct should attract some discipline, we are not satisfied that the employer has demonstrated it had just cause for discharge. Sullivan had worked for the respondent for well over two months, not an insignificant period in the construction industry, and this was the first occasion where Sullivan's conduct, in the employer's view, warranted discipline. Given the nature of Sullivan's misconduct on April 10, discharge is too severe a response in all of the circumstances.

19. We have found that Bosch's silence on April 10 should not have led Sullivan to conclude that he had Bosch's consent to leave. But Bosch's silence is inconsistent with the position that the employer had just cause for discharge. It is difficult for us to treat Sullivan's misconduct severely when a representative of the employer responds with silence to a situation which, if taken seriously, would have prompted at least some comment and discussion. Bosch did not ask Sullivan for a reason, did not tell him he could not leave, and did not advise him that if he left, he would be doing so at his peril. One can only conclude that Bosch's failure to treat the incident seriously is indicative of the fact that Sullivan's departure from the site was not seriously damaging to legitimate employer interests. This is consistent with the fact that there was little difficulty in completing Sullivan's assignment after he left and the uncontradicted evidence that by April 10, welding work was not all that critical.

20. In exercising our discretion under section 44(9) of the Act, we have considered, in addition to those matters referred to in the three preceding paragraphs, the following:

- (a) the birthday incident in which Sullivan conceded that Churchill viewed the schedule with some importance and his absence with some concern;
- (b) the importance of schedules on construction projects generally;
- (c) Sullivan's failure to adequately advise management of the possibility that he might leave the site during the course of his shift on April 10;
- (d) Churchill's meeting with the employees on April 9; and,
- (e) the fact that the parties recognized in subsection 3.03 of the collective agreement (paragraph 14, *supra*) that a disciplinary response in the form of a suspension may be an appropriate response, depending on the circumstances.

21. Accordingly, we find that Sullivan's discharge, which was communicated to him on April 11, 1986, was without just cause and, therefore, contrary to article 3 of the collective agreement. Having found that there was cause for some discipline and in exercising our discretion under section 44(9) of the Act, we substitute for the discharge a five day suspension. The Board directs that the respondent compensate Sullivan for any wages or benefits lost between April 10, 1986 and the time when Sullivan would have been laid-off in the ordinary course of business, less the five day suspension. It would not be appropriate to direct the respondent to reinstate Sullivan, since it appears that the respondent's SWARU project has been completed. In accordance with the agreement of the parties, the Board will remain seized of this matter in the event that the parties are unable to agree on the amount of compensation to which Sullivan is entitled.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. We have before us a straightforward discharge grievance involving the construction industry.

2. I find as fact:

- (a) The employer gave warning to its employees, including the grievor, of its concern with the high level of absenteeism on this job. This warning was given shortly before the incident in question.
- (b) The grievor and his foreman (who is a member of the union) did not see eye-to-eye as a result of differences which arose on a previous job when both were journeymen.
- (c) The grievor did not like to work at height.
- (d) On the day in question the foreman assigned the grievor to a job which was at some height above ground. The grievor may have felt that the foreman was indulging in an old grudge in making the assignment. This was not substantiated and in fact was disproven by the evidence led by the employer.
- (e) At mid-morning, the grievor climbed down from his work position and

left the job. As he passed his foreman on the way out he stated his intentions as "*I'm fucking off*".

(f) The employer terminated the employment of the grievor.

3. Construction industry employees are subject to minimal supervision, often by 'working foremen' who are also members of the union. As a result, a degree of self-discipline is required of them to provide an honest day's work for a day's pay. With the hiring hall process, employers on a job of this size usually take what they are sent by the union. Both the employer and the union are usually concerned with employees/members who 'goof-off' on the job.

4. This is a classic case of a construction industry employee who did not give a damn about his obligations to his employer or his union and indicated his disdain by walking off the job in the manner he did.

5. The employer had just cause to terminate the employment of the grievor. Hopefully the union could send him to a job where he would be happier and would perform his duties with due regard to his obligations.

0999-86-U Ghiansaroop Persaud, Complainant v. Consumers Distributing Company Limited, Teamsters Local Union 419 and Sean Floyd, Respondents

Practice and Procedure - Unfair Labour Practice - Employer objected to Board hearing complaint because of delay - Employer's argument that complaint should have been filed when complainant became aware of alleged conspiracy to remove complainant from job rejected - Reasonable for complainant to file complaint only when alleged conspiracy made public - Not desirable for complainants to file suspicions - Board not prepared to dismiss complaint on basis of delay - Reverse onus provision applying to employer - Employer directed to proceed first

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

APPEARANCES: *James Hayes* and *Richard Blair* for the complainant; *M. E. Geiger*, *Cliff St. Pierre* and *Mike Gietka* for Consumers Distributing; *J. James Nyman*, *J. David Watson*, *Frank Girmaldi* and *Don Swait* for Teamsters Local 419.

DECISION OF PATRICIA HUGHES, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON; May 29, 1987

1. The style of cause is hereby amended to remove The Toronto Star as intervener.

2. The complainant, Ghiansaroop Persaud, alleges that the respondent Consumers Distributing Company Limited ("the company") has breached sections 64, 66 and 70 of the *Labour Relations Act* ("the Act"); he further alleges that the respondent Teamsters Local Union 419 ("the union" or "Local 419") has breached sections 64, 66, 68 and 70 of the Act; and further, that the individual respondent Sean Floyd has contravened sections 64, 66 and 70 of the Act.

3. The hearing into these matters began on January 9, 1987, and continued on February

12, March 24 and March 25, 1987. During that period, the Board was required to rule on several procedural issues. In a decision dated February 11, 1987, the Board ruled that it would be inappropriate for the Board to contact the Divisional Court with respect to a decision of that Court then pending which dealt with the issue involved in this complaint "to make whatever request of the ... Court the Board felt appropriate", as suggested by counsel for the Company. In a second decision dated February 17, 1987, the Board issued a subpoena requiring Mr. Gary Dassy to attend at a hearing for the purpose of producing an affidavit sworn by him which had formed the basis of an article published in the *Sunday Star* on June 22, 1986, upon which, in turn, certain allegations made by the complainant were founded.

4. This decision records one of the oral rulings made by the Board during the hearing on March 25, 1987, the reasons for the majority's decision on the company's objection to our hearing the case because of delay (the majority's decision and the dissent, without reasons, are recorded in a decision dated May 8, 1987); and the Board's reasons for its decision that subsection 89(5) applies in this case (the rulings on these matters, without reasons, appear in decision dated May 20, 1987).

5. After dealing with several matters raised by counsel, the Board commenced hearing evidence relating to the delay between the date of the complainant's dismissal (May 29, 1984) and his bringing this complaint (June 22, 1986). That evidence is considered more fully below. It became apparent during cross-examination of the complainant by the company's counsel that there was some dispute about the Board's earlier ruling which had limited the scope of inquiry during this portion of the hearing to the narrow question of delay. We had ruled that counsel for the company could not ask questions about the complainant's alleged participation in an illegal strike and other issues which might be related to the Board's broad discretion to hear the complaint under section 89 of the Act *at this time*. Counsel for the union and counsel for the complainant both expressed their view that the Board's earlier oral ruling was that the issue to be addressed at this time was that of delay only and that the Board had not precluded counsel for the company from raising other matters relating to the Board's broader discretion at a later time (that is, during the hearing on the merits, should the Board not dismiss on delay). After the Board's confirmation that this was an accurate reflection of its earlier ruling, counsel for the company ceased questioning the complainant and requested that submissions on delay be adjourned until the next morning in order to permit him to separate his argument on delay from other issues upon which he had anticipated making argument. We agreed to this request, although counsel for the complainant was prepared to proceed. However, at the beginning of the following day's hearing, counsel for the company, instead of making submissions on delay, once again raised the Board's ruling on the scope of this initial or preliminary inquiry.

6. Believing that it would be in the interests of an expeditious hearing to clarify the procedure to be followed, a goal desired by all parties, we made the following oral ruling at this point in the proceeding:

At the outset of the hearing into this matter, counsel for the respondent company raised several concerns directed to whether the Board should hear this case and other preliminary matters. These cited issues were: lack of particulars, production of the affidavit referred to in the complaint, delay, abuse of process, potential conflict in decisions between various bodies hearing related matters, the effect of a settlement entered into by all the parties, settlement discussion privilege, *res judicata*, the pending related Divisional Court decision, and the effect of the *Windsor Western Hospital* case.

The Board ordered the complainant to provide particulars in proper form. The complainant did so. The Board also issued a subpoena to Gary Dassy, author of the affidavit, directing him to produce the affidavit. The affidavit was produced at a hearing convened for that purpose.

Having considered the parties' interest in having the Divisional Court decision prior to proceeding in this matter and in our dealing with this complaint expeditiously, the Board determined that of the various matters raised by counsel for the respondent company, the issues of delay and of the binding nature of the settlement could be dealt with as discrete preliminary issues. The Board made an oral ruling to that effect on February 12, 1987. The Board did not rule that the other matters raised by counsel for the respondent company would not be relevant to the Board's discretion in dealing with this matter. It did not specify how they would be dealt with but implicit in the Board's specifying that the delay and settlement issues were to be addressed during the next days scheduled for this matter, was the view that the other matters would be dealt with should the Board go on to hear the merits. The Board understood and intended that the legal effect of the ratification provisions and so forth in the settlement would be addressed by the parties during these days set aside for delay and the settlement.

At the continuation of the hearing on March 24, 1987, counsel for the respondent company sought a broad interpretation of the matters to be addressed on the delay issue and indicated his understanding that the Board's ruling on February 12, 1987 was intended to include all matters going to the Board's discretion to hear this case under section 89 of the *Labour Relations Act*.

The Board confirmed its original ruling that delay only was to be addressed, not all matters going to the Board's discretion. The Board specifically indicated that counsel for the respondent company would not be precluded from addressing the other issues should we hear the case on the merits. It clarified that the aspect of the settlement to be addressed was the condition precedent since arguments based on misrepresentation and unconscionability which counsel for the complainant indicated he would be making were too bound up with the merits to deal with separately.

Evidence was adduced by counsel for the complainant with respect to when the complainant learned the "facts" alleged in the complaint. This was the focus of the delay issue; no evidence was adduced to explain any delay which the Board might find occurred [that is to say, the evidence adduced went only to when Mr. Persaud learned about the alleged conspiracy]. Counsel for the respondent cross-examined the complainant. The Board ruled that he could not ask questions relating to matters going to other discretionary issues during cross-examination on delay - specifically the Board ruled he could not cross-examine on the matter of fraudulent misrepresentation at this time. Counsel then asked no further questions.

The Board reaffirmed its earlier ruling on the matters to be addressed at this stage of the proceedings. On agreement of the parties, the Board ruled that all settlement issues would be addressed on the merits, rather than separat-

ing those issues. Counsel for the respondent then raised the question of when the Board would deal with the *Windsor Western Hospital* case. The Board confirmed that it could be addressed at the end of the merits.

Counsel then indicated he would be bringing no evidence on the delay issue and requested that submissions be made today.

At the outset of the hearing today, counsel for the respondent again questioned the Board's ruling and asked for reconsideration of yesterday's ruling. Alternatively, he asked that he be able to raise delay again at the end of the case as a factor going to the Board's discretion. He cited three areas of concern (delay, abuse of process, including the conduct of the complainant, and the settlement) which could have been dealt with as preliminary matters. He again set out his arguments in relation to each of his concerns. He alleged that the Board had precluded his asking the complainant questions on his legal obligations and his suspicions and on his state of mind.

The Board confirms its earlier ruling and its clarification of that ruling, made for the benefit of counsel for the respondent.

The Board has not at any time precluded counsel for the respondent from raising the issues going to the Board's discretion, and does not do so now. His forceful arguments made it very clear that these matters were so interrelated that the Board was of the view that they could be dealt with adequately only when the Board had all the evidence before it.

The relevance of delay at the end of the case will depend on the Board's decision on that issue after we have heard submissions on the issue. The only matter before the Board is whether there was delay - what the complainant knew and when: effectively, was there any delay. Clearly the Board needs to hear submissions on that issue before any further determination can be made. Should it go on to hear the merits, the relevance of the delay issue will have to be addressed in the appropriate context.

Counsel for the respondent company has requested he make submissions on delay first. The Board considers that appropriate.

7. We turn now to the issue of delay. According to the complainant, he had first heard that Gary Dassy had said that the company and Sean Floyd had plotted to dismiss him on June 16, 1986 when John Deverell, a reporter for the *Toronto Star*, called him to tell him that he (Mr. Deverell) had a written statement from Mr. Dassy. He first heard there was a meeting between Mr. Dassy, Mr. St. Pierre and Mr. Floyd on June 22 when he read about it in the *Sunday Star*. That was also the first time he heard that the company and the union viewed him "as an obstacle". He filed his complaint on July 10, 1986. With respect to subsequent allegations filed on October 22, 1986, relating to an alleged breakfast meeting between Mr. St. Pierre and Mr. Floyd, the complainant testified that that information first came to his attention in August 1986.

8. Counsel for the company produced in evidence several newspaper articles dated June and July 1985 containing comments which he contended were in substance the same as the allegations now before the Board.

9. Certain reported statements concerned the following paragraph in the complaint as originally worded:

4. Between 1979 and 1982, Consumers' Distributing made secret payments in the amount of approximately \$250,000 to Sean Floyd.

Counsel for the complainant had stated that this statement was not intended as an allegation and, indeed, it was struck from the complaint to avoid confusion and in response to company counsel's concern.

10. Of more significance are statements in the newspaper articles which refer, in various ways, to a "purported" deal between the company and the union to dismiss the complainant.

11. An article in the *Toronto Star*, dated June 22, 1985, (Ex. 3 in these proceedings) states that "Wildcat strikers at Consumers Distributing say they will stay out until the company rehires a union steward who, they charge, was 'sold down the river' in a deal between company management and Teamsters Local 419". Mr. Persaud agreed that he was the union steward referred to, that he knew about the allegations made by the workers and that he was making them himself. An article published in the *Globe & Mail* on July 5, 1985 (Ex. 4 herein) stated that "John Persaud sees himself as an unwitting victim of a secret deal between his former employer and his own union". Mr. Persaud is quoted as saying "It's obvious they wanted to get rid of me because I stood in the way of their cosy deal". (It appears that "their cosy deal" refers to the payments made by the company to Mr. Floyd to maintain labour peace.) (A July 11, 1985 column in the *Toronto Star* says that Mr. Persaud "says Floyd was as happy to be rid of him as was the company". Mr. Persaud agrees he made the statement. However, such a statement does not allege a conspiracy between Mr. Floyd and the company to be rid of Mr. Persaud but merely indicates that Mr. Persaud thought they had the same reaction to the event.)

12. In this regard, we also considered carefully the inclusion of the following paragraphs in the complaint filed by Mr. Persaud under the Ontario *Human Rights Code* on October 15, 1984:

11. ... [On May 25, 1984 Gary] Dassy was heard telling employees that he would give a statement which would get me fired.

12. On May 28, 1984, when I went to work this statement was all over the plant. I brought this to the attention of the Manager, Mr. Baylis, Brien [sic], the supervisor and Mr. Melnychuk; Industrial Relations Manager; but no action was taken. Nothing further was said by management that day.

13. On or about May 29, 1984 ... I was terminated for intimidating Garry [sic] Dassy and telling him to slow down. I denied that I had done any such thing, pointing out that Dassy was an employee with whom I had little in common and seldom spoke to.

Mr. Persaud obviously was of the view in October, 1984 that Mr. Dassy was involved in his (Mr. Persaud's) dismissal. He knew, then, if the above statements are true, that he was told that he was being dismissed because of the way he had allegedly acted towards Mr. Dassy. After careful consideration, we conclude that the statements cited above do not allege a conspiracy between the union and the company.

13. The kind of factors the Board takes into account in determining whether it should dismiss a complaint on the basis of delay are set out in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 at paragraph 20. Among those factors is the time at which the complainant became aware of the violation or, when, with reasonable diligence, he *ought* to have become aware.

14. Counsel for the company argues that the newspaper articles show the complainant was aware or believed that the union and the company had acted in conjunction (“conspired” or “made a deal”) to “get rid of him”. The articles do show that Mr. Persaud (and others) were voicing opinions as long ago as June or July 1985 that the company and the union “conspired” to remove Mr. Persaud from his employment. Counsel for the company says that Mr. Persaud should have filed his complaint and then obtained his evidence. He pointed to Rule 72 of the Board’s Rules of Procedure which reads:

72.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

Counsel argues that this Rule means that when Mr. Persaud thought that the company and the union had made a deal to get rid of him, he should have filed the complaint, even though he did not have evidence to sustain such a complaint. Despite the initial attractiveness of counsel’s analysis of Rule 72, we are of the view that Rule 72 is not intended to encourage ‘in the air’ complaints but is intended to ensure only that the opposing party has sufficient knowledge of the case to meet it. Indeed, had Mr. Persaud filed his suspicious as a complaint under section 89, there is little doubt that he would have been faced with a request for particulars under Rule 72, a request he would have been hard put to satisfy.

15. The Board has indicated previously that it is not desirable for complainants to file suspicions. In *Luciano D’Alessandro*, [1983] OLRB Rep. Oct. 1699, the Board dealt with a complaint that the union’s hiring hall procedures contravened section 69 of the Act: “However, although he had heard rumours about improper referrals, he ‘couldn’t prove anything’ because the respondents would not permit him to examine the hiring hall records”. The Board continued at paragraph 9:

Mr. Minsky also contended that Mr. Marinaro should have filed a section 89 complaint based upon his suspicions and used such complaint to gain access to the hiring hall records. However, the Board does not find that contention to be meritorious. The use of the Board’s processes as a means of discovery in respect of allegations based upon mere suspicion is not something which the Board would desire to encourage (although it may be necessary in some circumstances, such as in some cases to which the section 89(5) ‘reverse onus’ applies).

In that case, the complainant had suspicions he felt incapable of proving because the union had denied him access to the information he required. In this case, the complainant had suspicions he felt incapable of proving until individuals were prepared to make public a conspiracy between the union and the company. Mr. Persaud did not choose to use “the Board’s processes as a means of discovery” at that time, as the Board indicated in *Luciano D’Alessandro*, *supra*, might in some instances be necessary, although not necessarily desirable. The allegations in this case are not that Mr. Persaud was dismissed but that the union and the company conspired together to carry out his dismissal. Only when individuals concerned made public their involvement in this alleged conspiracy did Mr. Persaud have more than a suspicion. Then he had the information necessary to satisfy the particulars required by Rule 72.

16. Alternatively, says counsel, if Mr. Persaud did not “know” that a deal had been made, he should not have been making accusations in the paper - in effect, public accusations of wrongdoing by the union and the company - when all he had were suspicions. Whether Mr. Persaud should have been making public accusations which he now says he could not have substantiated at that time is not for this Board to decide. The question the Board does have to decide is whether Mr. Persaud should have filed his “suspicions” and then tried to obtain the evidence. On the basis of the evidence, we are satisfied that Mr. Persaud had strong suspicions that the union and the company had in some way concocted to fire him. But we are not satisfied that it was unreasonable for him to file his allegations only when Mr. Dassy and Mr. Floyd made their “participation” (direct or otherwise) in the alleged conspiracy public. Counsel argues that Mr. Persaud could have obtained the evidence he required with diligence. This complaint involves allegations of secret deals; the very conduct complained of was intended to be secret.

17. In addition, counsel says that the principle of *res judicata* prevents Mr. Persaud from enjoying a hearing into this complaint. He maintains that Mr. Persaud should have joined his allegations with a section 89 complaint brought by other employees which was settled by the parties (see Board File No. 1379-85-U), and that a failure to do so is a factor going to delay. (The settlement is not before us.) The requirements of the principle of *res judicata* (or issue estoppel) are set out in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248. Those requirements are the same question has been decided in a final decision involving the same parties or their privies. Furthermore, the determination of the issue in dispute must be fundamental to the original decision or directly in issue. In *Preston Spring Gardens Retirement Home*, [1985] OLRB Rep. March 463, the Board dealt in some detail with the application of *res judicata* or issue estoppel to its proceedings, saying in part that “the Board must be cautious not to apply the principle too broadly. In our view, *res judicata* only arises when a party attempts to re-litigate the same issues arising out of the same transaction or conduct that have been finally determined elsewhere in a proceeding involving that party or a privy to that party”.

18. The allegations before us were not in issue in File No. 1379-85-U. That complaint alleges a conspiracy between the union, the company and officials of the company and union to frustrate collective bargaining and makes specific reference to the payments by the company to Sean Floyd for the purpose of ensuring “labour peace”, a reference to which is also made in Ex. 4 in these proceedings, referred to in paragraph 11 above. There is also specific reference to another Teamsters official “actively assist[ing] in covering up the conspiracy when individual union members attempted to investigate and expose the illegal actions of the company and the union”. No specific reference was made to Mr. Persaud and he was not a complainant in File No. 1379-85-U. Nor is Mr. Persaud a privy to the parties in that complaint. He could not stand in the stead of any of the employees who brought the complaint. It is not sufficient that he might have benefited from the requested relief which included the reinstatement of all employees discharged “between 1979 and the date of the complaint” or alternatively, arbitration of grievances during that period.

19. More broadly, the principle of *res judicata* extends “to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”: *Hall v. Hall* (1958), 15 O.R. (2d) 638, citing *Henderson v. Henderson* (1843), 67 E.R. 313. Counsel argues that principle encompasses Mr. Persaud’s allegations. Even if we were of the view that Mr. Persaud could have brought his allegations at that time, we are not convinced that he was required to include his allegations in that complaint. He is not forced to join his complaints with the complaints of other employees, particularly in light of the fact that that complaint does not specifically allege that the company and the union conspired to remove Mr. Persaud, nor does it allege that Sean Floyd and Mr. St. Pierre discussed payments of

money to Mr. Floyd by the company if Mr. Floyd would remove the complainant. In our view, the principle of *res judicata* does not apply in this case.

20. We have also considered the prejudice counsel contends the company will suffer if we hear the merits of this complaint; however, we are not satisfied that the respondents will be prejudiced by our hearing the complaint. Although counsel for the company argued that there would be a corrosive effect on the newly-developing collective bargaining relationship between the company and the union, he adduced no evidence on that point and conceded, indeed, that it may have been "inappropriate" for him to have raised that issue. He maintains that the company and the union had the right to assume these matters would not be dealt with again because they had been dealt with in Board File No. 1379-85-U; we have found, however, that the matters raised in that complaint did not include the allegations before us. The company, he says, will be the subject of further press reports. He says further that there is prejudice in the cost and duplication of proceedings (there are a human rights complaint, an arbitration and court proceedings extant). He argues further that the grievor has available other remedies which he has taken (the human rights complaint and arbitration) and that these allegations would be more appropriate before an arbitrator than this Board. In our view, the fact that the complainant has access to other forums is not necessarily a reason for this Board to decline to exercise its jurisdiction to hear these matters. Nor is this an instance in which we believe deferral of these proceedings would be appropriate. We do believe that these allegations are very much in the nature of the matters within this Board's jurisdiction: allegations of union/company conspiracy go to the heart of the system of labour relations endorsed by the Legislature of this province through the *Labour Relations Act*.

21. Having regard to when the complainant became aware of the exact circumstances underlying the allegations in this complaint, the nature of the complaint and the lack of evidence relating to any prejudice to the company, or the union, we are not satisfied that we should dismiss this complaint on the basis of delay alone. The Board is reluctant to dismiss a complaint on the basis of a preliminary objection unless it is certain that the objection has been established and the complaint should not be entertained on the merits.

22. Our refusal to dismiss the complaint at this stage is not intended as a direction one way or the other with respect to counsel for the company raising the delay issue again at the end of the case. Whether and how that issue is raised is left to counsel to determine as the course of the case unfolds, subject to our ruling on any objections at the relevant time.

23. Counsel for the company questioned the application of subsection 89(5) of the *Labour Relations Act* to the circumstances of this case. Subsection 89(5) is the so-called "reverse onus" provision and reads as follows:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

24. We directed that counsel for the company make written submissions on this issue by March 31, 1987. He filed submissions on other matters (upon which no direction had been made and which impinge on matters upon which the Board has already ruled) but with respect to the application of subsection 89(5) submitted only that it was inappropriate to make submissions at this time. His submissions addressed the question of order of proceedings, rather than whether the reverse onus should apply. Given our direction to the parties, we are ruling on the issue of reverse onus as well as order of proceeding.

25. The significance and impact of subsection 89(5) were considered thoroughly by the Board in *I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621. There the Board held that subsection 89(5) imposes a single legal burden on an employer; in short, subsection 89(5) places a reverse onus on an employer under the circumstances set out in the subsection. While usually the party having the legal burden of proof adduces evidence and makes submissions first (on the advantages of this scheme, see *I.C.B. Warehousing*, *supra*, para. 39), the two matters (legal burden or onus of proof and order of proceeding, or, as termed in *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665, "the ultimate burden of proof" and the "burden of going forward" or "evidential burden") are distinct and it may be that in some cases, the party having the onus of proof will not proceed first, often (and perhaps usually) where the parties have agreed to depart from the usual order.

26. This case involves a discharge; however, the essence of the question before the Board is whether there was a "conspiracy" or "secret deal" between the union and the company which resulted in Mr. Persaud's discharge, rather than the discharge itself, which in turn had the consequence of preventing Mr. Persaud from engaging in union activity. That is why there is not the overlap in proceedings between this Board and the arbitration concerned about the discharge upon which counsel for the company has placed considerable emphasis during his oral and written submissions to date. (Similarly, the issue before the Ontario Human Rights Commission is whether Mr. Persaud was the subject of discrimination on the basis of race or national origin; no such allegation forms part of the complaint before this Board.) Although we indicated in our oral rulings that we were prepared to address deferral to arbitration proceedings and the effect of *Windsor-Western Hospital Centre Inc. and Mordowanec et al* (1987), 56 O.R. (2d) 297 during the hearing on the merits, we make the following two observations on those issues which counsel for the company raised in his written submissions. We merely refer to the following comments from *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254:

4. [The] responsibility [of the Board under the *Labour Relations Act*] is a public duty and a policy of deferral to a more private process where the adjudicators are paid and selected by the parties to a collective bargaining agreement must find its justification within the four corners of *The Labour Relations Act* to be consistent with that public interest....

5. ... [The] arguments for and against a policy of deferral to grievance arbitration rely upon significant but conflicting values and this conflict in values, unsurprisingly - has established a "discretionary balance" on deferral questions. The Board will defer but deferral, either before or after arbitration is in no way automatic.

We note that the nature of the allegations in the instant case impinges directly on the scheme of labour relations which the Legislature has determined is appropriate in this province: while a healthy union-employer co-operation ("harmonious relations") is encouraged, that "co-operation" is not to take the form of secret deals. On the contrary, the legislation envisions an arm's-length relationship between the employer and the union. Furthermore, it is of major import that the union and employer are *both* alleged to have participated in a deal leading to Mr. Persaud's dismissal. That particular aspect of the case distinguishes it from the usual discharge case before an arbitrator and brings the case into the public rather than the private realm. With respect to the *Windsor-Western Hospital* case, *supra*, we simply note that the arbitration in that case had been completed. That is not yet the case here. (We are not to be taken to mean by that comment that that exhausts our consideration of that case or its relevance to the case before us.)

27. If subsection 89(5) is to apply, we must determine whether this allegation is encompassed by the open-ended list set out therein. This is a complaint under sections 64, 66 and 70 of the Act. Leaving aside the status of the complainant to bring a complaint under section 64, the essence of the complaint is that the alleged conspiracy, because it led to the discharge, prevented

Mr. Persaud from participating in union activity: the conduct of the employer (and the union) has been contrary to the Act with respect to Mr. Persaud's employment, the type of conduct encompassed by subsection 89(5). We note, in response to company counsel's submission that this case differs from most cases in which subsection 89(5) has been applied because it is not concerned with unionization (here counsel is referring to order of proceeding only), that the initial period of unionization is not the only time during which an employer may engage in conduct described in subsection 89(5). In this case, the allegation relates to a period of collective bargaining between the union and the company; any attempt to reduce the union's effectiveness during that process by affecting an employee's employment would constitute anti-union animus just as it would during the union's organizing campaign. Accordingly, the employer has the legal burden in this case.

28. Of course, the Board only turns to the onus to resolve a complaint in which each party has made out an equal case. Thus it is tempting to wait until the end of the case to rule on where the legal burden is placed, as counsel for the company has urged us to do. However, because of the course of these proceedings to date, an early ruling on this matter seems preferable; furthermore, we must decide the order of proceeding which, as already indicated, is closely, although not automatically, tied to the question of onus of proof.

29. The Board indicated at the hearing that it would likely accede to any order of proceeding to which the parties have agreed. In the absence of such agreement, the Board agrees with counsel for the union and for the complainant that the appropriate order is as follows: the employer presents its evidence first, followed by the complainant and finally by the union. The employer, of course, has "the last word" (as does the complainant with respect to his case against the union).

30. In reaching this conclusion with respect to order of proceeding, we have considered the parties' written submissions, in particular those of counsel for the company relating to the state of knowledge now enjoyed by Mr. Persaud compared to that when he was discharged or made the public comments referred to above in our decision on delay and to his point that if neither of the meetings referred to in the allegations took place, "the jurisdiction of this Board is ended". With respect to the first submission, as we note in our decision on delay, the difference between the comments made by Mr. Persaud as reported in the newspapers and this complaint is the difference between suspicion and sufficient knowledge to avoid having the complaint dismissed for lack of a *prima facie* case or lack of particulars. With respect to the second point, the employer may respond to the allegations by showing the meetings did not take place; alternatively, it may show that Mr. Persaud's dismissal was not motivated by anti-union animus. Whether the employer takes either or both of these approaches is the employer's choice: both require explanations which the employer is in the best position to provide.

31. In summary, the majority is not prepared to dismiss this complaint on the basis of delay; the Board unanimously rules that the "reverse onus" provision applies to the respondent company and that the company shall proceed first, the complainant second and the union last.

DECISION OF BOARD MEMBER JUDITH A. RUNDLE;

1. I dissent from the decision of the majority. I would have exercised the discretion pursuant to section 89 and declined to entertain this complaint on the basis of delay.

2. The Board's policy relating to delay and the rationale for such policy is set out in the following passages of its decision in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. *Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.*

[emphasis added]

At paragraph 22 the Board went on to state:

...Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view *unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.*

[emphasis added]

3. In the present case the complainant, Mr. Persaud, could not by any standard be seen as inexperienced or as being unaware of his statutory rights. It is beyond doubt that as a former union steward, he had significant experience in labour relations matters and was fully aware of his rights. Yet he waited approximately two years and two months from the date of his dismissal before filing this complaint.

4. Mr. Persaud agreed that he had made the statement reported in the *Globe & Mail* of July 5, 1985 that he "sees himself as an unwitting victim of a secret deal between his former employer and his union". Since this alleged "secret deal" is the crux of this complaint (as opposed to the discharge itself) it is clear by his own admission that at least as early as July 1985, Mr. Persaud was aware of the violation now alleged. Furthermore, in his complaint to the Human Rights Commission dated October 15, 1984, Mr. Persaud states at paragraph 11 that "Dassy was heard telling employees that he would give a statement which would get me fired".

5. When considering these facts in light of the Board policy as set out in *City of Mississauga (supra)*, and followed in numerous subsequent cases, it becomes clear that there has been extreme and unjustified delay in the filing of this complaint. The complainant is experienced

in labour relations. He was publicly alleging the very substance of this complaint as early as October of 1984. There is no doubt that if he had acted diligently, he could have informed himself more fully to have filed this complaint much earlier than he did.

6. A major consideration in my decision is the adverse impact of this delayed litigation on the collective bargaining relationship between Consumers and the union. In the *City of Mississauga* case, at paragraph 21, the Board referred to "the potentially corrosive effect which litigation can have on the parties' current collective bargaining relationship" and also stated that "adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past". These concerns are directly applicable here. The employer and the union here have had an extremely disruptive and unpleasant relationship during the past few years. Through the legal system those responsible have been brought to justice. The company and the union have brought in new personnel in the hope of creating a new relationship. In my view, the Board is not facilitating or promoting harmonious labour relations by allowing the complainant at this point to resurrect "ghosts from the past". On the contrary it will have a corrosive effect on the bargaining relationship which has been mended after some turbulent years.

7. In summary, Mr. Persaud did not learn anything from the Toronto Star article that he did not know or that he could not have known with due diligence. The delay is extreme and unjustified. Good labour relations policy dictates that this litigation should not be permitted at this late point of time.

8. For all of these reasons, and also considering the absence of overriding circumstances or public policy reasons requiring the Board to ignore this lengthy delay, I would have declined to entertain this complaint.

9. I concur with the majority decision with respect to the onus issue and order of proceeding.

0901-86-R Laura Godin, Applicant v. United Food & Commercial Workers Union, Local 409, Respondent v. **Current River Foods Ltd.**, Intervener

Practice and Procedure - Termination - Whether panel should disqualify itself on grounds of bias or reasonable apprehension of bias - Bias allegation consisting of manner in which panel decided various preliminary matters, including the issue of whether the applicant had status to bring the application and the order in which the evidence was to be led - Panel declining to disqualify itself

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *William G. Shanks*, *Dave Krasnichuk* and *Laura Godin* for the applicant; *W. Dubinsky* and *Don Onichuk* for the respondent; *F. J. W. Bickford* and *Jim Bacarri* for the intervener.

DECISION OF THE BOARD; May 1, 1987

1. The name of the respondent is amended to read: "United Food & Commercial Workers Union, Local 409".
2. This is an application for decertification filed pursuant to section 57 of the *Labour Relations Act*. During the course of the first day of hearing into this matter, before the Board heard any evidence, counsel for the intervener employer made a motion to the Board to have both the present panel, and the entire Board, disqualified from continuing with this matter. This motion was fully argued before the panel, which reserved its decision, and subsequent to the hearing counsel for the intervener forwarded written submissions confirming and expanding upon his oral submissions. We must decide whether we should disqualify ourselves, on the grounds of bias or reasonable apprehension of bias, and whether in the interest of fairness to all parties, a differently constituted panel of the Board should conduct this proceeding.
3. The intervener employer was found to be a successor employer, pursuant to section 63 of the Act, in a decision of the Board dated November 7, 1986 (Board File No. 1799-85-R). As that panel of the Board (differently constituted in its entirety) stated at paragraph 18 therein: "Therefore, Current River Foods Ltd. is the successor employer to Canada Safeway Limited respecting the Current River store and is bound to the collective agreement between Canada Safeway Limited and United Food & Commercial Workers International Union, Local 409 which was in effect at the time of the sale." Current River Foods Ltd. applied for reconsideration of that decision in a letter dated December 16, 1986. In a decision dated December 31, 1986, that panel of the Board dismissed the application for reconsideration.
4. The applicant Laura Godin, filed this application for decertification on July 2, 1986, before the Board had issued its decision declaring the intervener employer the successor employer to Canada Safeway Limited. This matter was originally scheduled to be heard on August 5, 1986 but was adjourned twice, at the request of the respondent union and with the agreement of the other parties. This matter came on for hearing on February 24, 1987. As the foundation of the alleged apprehension of bias lies in the events that occurred at the hearing, it is necessary to set them out in some detail.
5. The hearing commenced with counsel for each of the parties making brief opening comments. As part of his opening comments, counsel for the respondent union confirmed the two preliminary issues set out in the union's filed reply; the question of timeliness and the union's request for a direction that the employer provide certain information prior to commencement of a hearing on the merits. In turn, during his opening submissions, counsel for the applicant filed with the Board a notice to bargain, which the parties agreed had been received by the intervener employer on July 10, 1986. All counsel agreed the relevant collective agreement had expired on August 31, 1986.
6. The Board then asked whether the applicant was legally and properly an employee in the relevant bargaining unit, for purposes of the *Labour Relations Act* and the within application, and accordingly, whether she had status to bring this application. None of the pleadings indicated whether the applicant, or any employees who signed the petition in support of the application, had been employees of the predecessor employer or had been hired subsequent to the sale by the intervener employer. The Board asked the parties whether the applicant's status was at issue, and referred the parties to *Emrick Plastics Inc.* [1982] OLRB Rep. June 861 and *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577. (Those cases suggest that the predecessor's employees have a right to continued employment in the bargaining unit and that, in some circumstances, employees hired contrary to the terms of the collective agreement would not be employees in the bargaining unit defined in the collective agreement. See also *Culliton Brothers Limited* [1983]

OLRB Rep. March 339.) Counsel for the respondent thereupon stated he had intended to deal with that issue first, then turn to the timeliness issue, followed thirdly by the issue over whether the Board direct the employer to produce certain information. Counsel for the respondent pointed out he had with him copies of both cases referred to by the Board, together with other cases on the same point, and had extra copies of those cases to be handed to the Board and fellow counsel during his submissions on the status issue.

7. Counsel for the applicant, Mr. Shanks, indicated he was taken by surprise by the raising of the status issue and would need a recess in order to review the matter. Mr. Bickford, counsel for the intervener employer, indicated he also was caught by surprise, both because the Board was raising the issue and because he had received no prior notice from counsel for the respondent. He also noted that the evidence before the panel of the Board which heard the section 63 matter had indicated that all employees in the bargaining unit employed by Safeway, the predecessor employer, had been absorbed elsewhere into the operations of Safeway and none of those employees had transferred over to or were at any time working for Current River Foods Ltd. On that basis, counsel submitted there could be no concern over whether the applicant had status to bring this application. The Board recessed to allow both counsel to consider their positions and advise whether they were prepared to deal with the applicant's status forthwith, or whether they required an adjournment in order to properly address the matter.

8. After the recess, Mr. Shanks and Mr. Bickford agreed that none of the current employees for the intervener were employees of the intervener at the time of the sale. They further agreed the respondent union was entitled to represent employees of the intervener subsequent to the sale. With respect to the status of the applicant to bring this application, both counsel submitted the onus was on the respondent union. Mr. Bickford further submitted that the intervener employer could in no way be faulted for not hiring individuals who had been absorbed by the predecessor employer, and that this fact was a complete answer to the status question, for the intervener employer must therefore have been entitled to hire employees other than those who had worked for the predecessor. He also submitted that consideration of the "status" issue was contrary to the principles of natural justice. In response to the Board asking how consideration of this issue might violate those principles, he did not respond. Mr. Bickford also stated that the Board protracting the proceeding was a serious disservice to all parties.

9. The Board reserved on the question of which party had the onus with respect to the status of the applicant to bring this proceeding. The Board noted, however, that the order in which parties would be asked to lead evidence was not the same question as where the onus lay, and the Board directed the intervener employer to first lead evidence with respect to the circumstances of hiring of the applicant, and other employees at work as of the application date, with respect to such matters as the names of those who had been hired, when they had been hired and whether union dues had been deducted on their behalf, as required by the collective agreement. After cross-examination, the intervener would be afforded the opportunity of liberal redirect. After the employer evidence concerning the hiring and employment circumstances of the employees in question, the union would lead its evidence, followed by the applicant's evidence. During its evidence, the union was to lead evidence of any alleged violations of the collective agreement in the hiring of the employees in question. The employer was thereafter to have a liberal right of reply evidence, to ensure it had an opportunity to lead its own evidence with respect to any alleged violations of the collective agreement, and to ensure it did not have to lead such evidence until the union had first led evidence in support of its allegations. The Board indicated an adjournment would be granted, if requested. Finally, the Board declined to issue a direction to the intervener requiring it to provide to the respondent union the information requested by the respondent. In response to a question from Mr. Bickford, the Board stated the employer was to go first and lead evidence only

with respect to the circumstances of hiring, and not evidence with respect to any alleged breach of the collective agreement.

10. Mr. Bickford forthwith asked for reconsideration of this decision. He submitted there was something procedurally wrong with the Board's direction that the employer proceed first to lead evidence, when the Board had not ruled on the question of onus. In his submission it was an extraordinary decision by the Board and it was incumbent upon the Board to first deal with the question of onus. He also submitted that a party making an objection must call evidence first with respect to the basis of the objection. The Board asked what was unfair about asking the intervener to lead evidence first, with respect only to the circumstances of hiring. Counsel's response did not suggest any aspect of the direction which might be unfair. Counsel also submitted the Board's direction with respect to the order of proceeding was against natural justice, against fairness, and against recognized procedures for making objections before adjudicative bodies.

11. After recessing, the Board reaffirmed its decision. The issues to be considered by the Board were at that stage the status of the applicant to bring the application and the status of those who signed the petition to be counted as employees within the bargaining unit. In order to properly consider these issues, the Board (and the parties) needed to be aware of the circumstances of the hiring of the employees in question, and evidence of this was within the possession of the employer. It therefore made sense that the employer lead evidence first, with respect to those circumstances of hiring. The Board reaffirmed that evidence in chief and cross-examination would be restricted to matters concerning the general employment circumstances of those individuals. The union would then lead its evidence in support of alleged breaches of the collective agreement and in the hiring of the employees in question, and therefore in support of its submission that the applicant had no status to bring the application. The Board affirmed that the union witnesses would first be cross-examined by the employer, and then by the applicant. After the union evidence, the employer was to have the opportunity to lead its evidence with respect to the status issue, followed finally by the evidence of the applicant on the status issue.

12. After the Board delivered its decision denying reconsideration and reaffirming its prior decision, Mr. Bickford indicated his client was concerned with the course of the hearing to date, and had formed a perception of bias. Accordingly, he moved that another panel of the Board be constituted to hear any further matters. Counsel also requested an adjournment to deal with the status issue.

13. Counsel indicated he would be filing written submissions in further support of his motion but he made extensive oral submissions. Counsel began by reviewing the chronology of events leading up to the decertification application, and he then reviewed the events and comments which had occurred in front of the panel. We do not intend to repeat those oral submissions, since many of them are reflected in the written submissions subsequently forwarded. However, it is appropriate to note a few of the oral submissions made by Mr. Bickford in support of his motion.

14. Counsel alleged four grounds as a basis for the bias allegation and the motion that the Board disqualify itself. First, the chronology of the hearing before the Board during the day, as outlined in his oral submissions, "spoke for themselves". Second, the Board had raised the status issue of its own volition, after counsel for the union had clearly identified two preliminary issues and indicated that he would only be dealing with those two preliminary issues. As Mr. Bickford stated, "the timing of the raising of the status issue on its own, after finding out that the application itself was indeed timely" raised a reasonable apprehension of bias. Third, the decision of the Board to defer reaching a decision on the onus issue really amounted to deciding the issue without deciding it, because the Board nevertheless directed that the company take the stand. Fourth, the

procedure the Board proposed to adopt, in directing the employer to testify, was inconsistent with procedures that have been established in administrative law. Those procedures had been grounded in procedural fairness and natural justice, and demanded that a party raising an objection must be the party to adduce evidence in support of the objection. Mr. Bickford did not indicate how the Board's ruling in this respect might be supportive of the bias allegation.

15. Counsel for the intervener then summarized the perception of his client. In counsel's submission, the order of proceeding during the morning had left his client with no other conclusion but that this panel, and perhaps the Board itself, is biased in favour of the respondent union and against the intervener employer. Counsel submitted any reasonable man would come to the same conclusions as his client. Further, the damage occasioned by the Board's biased approach might well be irreparable, for it was clear counsel for the respondent union had no intention of ever raising the status issue, and the issue was only now raised because of the Board's improper intervention. Mr. Bickford expressed the concern that if the proceedings continued, in front of another panel, the issue of status would be raised by the respondent union, and given the circumstances as to how it was first raised, that would be unfair. In light of the allegation of bias against the entire Board, not only this panel, the Board inquired of counsel what remedy he was seeking if this panel should agree with his submissions. Mr. Bickford responded that his comments were really directed only to this panel.

16. With respect to rectifying the damage caused by the biased intervention and directions of the Board, the only way to remedy the problem, submitted counsel, "without destroying justice, is to proceed on the basis that the parties were originally proceeding on"; that is, constitute a new panel to hear the matter and preclude the union from raising the status issue.

17. Counsel for the applicant made no submissions with respect to the motion. It is unnecessary to set out the submissions made by counsel for the respondent union, except to note that counsel indicated he had been going to raise the status issue, had researched it, and had copies of the relevant jurisprudence with him. Counsel further noted that at the time the matter had first been discussed, earlier in the day, he had distributed copies of the relevant cases on point to fellow counsel, confirmatory of his intention to raise the issue. Counsel for the respondent also strenuously objected to Mr. Bickford's submission that there had been a finding that the application was timely.

18. After reserving and adjourning, the Board received written submissions from Mr. Bickford as noted above. We turn now to consider all the submissions, oral and written and whether fairness demands that this motion be granted.

19. We first comment on some of counsel's characterizations of what occurred at the hearing. At paragraphs 8 and 9 of the written submissions Mr. Bickford maintains that at the beginning of the hearing counsel for the respondent indicated that he had only two preliminary issues to raise. Further, in paragraph 17 of the submissions, he notes that "the union's position throughout has been that the only two preliminary issues were timeliness and the failure to produce employees names". We cannot agree that that is either what occurred or a reasonable interpretation to be placed upon events. Mr. Dubinsky, for the union, reaffirmed or noted the two preliminary issues set out in the pleadings. He did not indicate that these were the only matters he intended to raise. Further, when the Board asked whether there was a "status" issue, Mr. Dubinsky responded that he had intended to raise that matter as well, and had with him the cases on point, and indeed several of those cases were then distributed to fellow counsel. The reply filed by the union only noted two preliminary matters and both the applicant and intervener would have been caught by surprise

at the hearing by the status issue. It was because of this surprise factor that the Board indicated an adjournment would be granted should the parties so request it, and indeed granted such a request.

20. In paragraph 21(4) of his submissions, Mr. Bickford submits "the Board only raised the 'status' issue after finding out the application was timely". We have difficulty in understanding the factual basis for this submission. As Mr. Bickford's own submissions indicate, in paragraph 21(3) immediately preceding 21(4), the union was raising a preliminary issue which went to the timeliness of the application. It was agreed that evidence and submissions with respect to that objection were to be entertained at a later time by the Board. The Board has difficulty in understanding how it could have "[found] out the application was timely", when that was the very matter before us and when the Board had not yet embarked upon an inquiry into that issue.

21. The grounds in support of the motion are contained in paragraph 21 of the submissions. Counsel notes, as the first ground, "the chronology of the hearing on February 24, 1987". He does not expand on this bald assertion, and we are unable to therefore assess how the chronology might have given rise to a reasonable apprehension of bias.

22. Counsel for the intervener next relies on the assertion that the Board raised the status issue, after it had previously defined the preliminary issues as being timeliness of the application and the request the employer provide employees' names. While the Board did note the two preliminary issues set out in the reply of the union, the Board did not characterize them as the only preliminary issues before it. Additionally, under section 57 of the *Labour Relations Act*, the Board *must* satisfy itself in a decertification application that the applicant has status to bring the application, and that the signatures contained on any petition represent the voluntary expression of the employees so signing. Even if the Board had raised this issue and the respondent union would not have, in raising it the Board would have been fulfilling its statutory mandate. Parties must, of course, be treated fairly, and afforded full opportunity to present their cases, but inquiring about an issue about which the Board is required to satisfy itself does not indicate bias on the part of the panel.

23. Mr. Bickford asks by way of remedy, should we accede to his motion, that any hearing before a differently constituted panel be restricted to the two preliminary issues noted in the pleadings by the respondent union, and that the issue of status be specifically excised from any subsequent inquiry. It appears to us that, by means of this motion, counsel in effect seeks to restrict the issues another panel might entertain in this application, and further, to preclude that panel from complying with its express statutory mandate. Were we to disqualify ourselves, we could not and would not so restrict another panel's inquiry.

24. The third and fourth grounds raised in paragraph 21 of the submissions have been dealt with previously. As earlier noted, the Board considers both submissions based on an inaccurate portrayal of what occurred at the hearing. The fifth ground alleges that the Board initially described the status issue in a certain manner and "only after finding out that all Safeway employees had continued their employment with Safeway and after hearing submissions from counsel for the union regarding alleged violations of the Collective Agreement *after* hiring employees, then broadening the scope of the status issue as originally defined by the Board to include an inquiry into the 'employment circumstances' *after* the present work force was hired." At the hearing, it appeared to the Board that counsel for the intervener did not understand why or how any issue could remain as to the status of the applicant. More particularly, Mr. Bickford vigorously maintained that the fact "that all Safeway employees had continued their employment with Safeway" provided a full and complete answer to the question of the status of the applicant to bring this application, and it was unnecessary to hear anything further on the matter. The Board explained to

counsel that such a fact or finding would not necessarily resolve the issue to be considered by the Board. Specifically, and as the Board indicated at the hearing, that employees of the predecessor had been absorbed into other Safeway operations did not necessarily answer whether the provisions of the collective agreement or the statute had been violated by the intervener in the hiring of the applicant and other employees as of the application date, and in turn, whether the current employees were properly within the bargaining unit. The issue for the Board is the status of the applicant and the employees who signed the petition in support of the application, and not the status of the employees of the predecessor. The Board cannot agree that attempts to clarify this to counsel reasonably raised perceptions of bias.

25. The sixth ground raised by Mr. Bickford is that the Board, “without deciding the applicant’s submissions that the onus was on the respondent union to establish the basis for the status issue ... directed the intervener company to give evidence ... which placed counsel for the intervener in a position of having to conduct an examination in chief of a representative of the intervener ...”.

26. As indicated at the hearing, the question of legal onus or burden of proof is a different matter from the question of the order of leading evidence. (See for example, *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800, and *Canadian Pizza Co. Ltd.* [1983] OLRB Rep. June 872.) We see nothing unfair or inappropriate in reserving on the question of onus, while at the same time directing that the employer proceed first with respect to the delineated matters. The burden of proof, or onus, comes into play only when all the evidence has been heard, should the Board be evenly balanced as to the conclusion it ought to draw from the evidence. In deciding which party should lead evidence first, the Board is guided primarily by a concern that the hearing proceed in as expeditious and as fair a manner as possible. Where it appears to the Board that certain evidence is uniquely or primarily within the possession or knowledge of one party, it may well make sense for that party to be asked to lead its evidence first. These factors led the Board to direct that the employer proceed first with evidence of the circumstances of hiring of the employees in question.

27. With respect to the onus, having reserved on this question, we are satisfied the onus lies with the applicant to establish that she has status to bring these proceedings, and that those who signed the petition in support were properly employees within the bargaining unit. This onus exists regardless of whether a preliminary objection had been raised, for the statute requires that the Board be satisfied an applicant has the requisite status to bring the decertification application. If, after all the evidence on this issue has been heard and after the parties’ submissions have been entertained, we are evenly balanced and uncertain as to whether the applicant has established she has status to bring this application, then reliance on the onus would lead us to dismiss this application. That onus however, does not cause us to change our prior direction that it is more appropriate, more expeditious, and fair, to ask that the intervener employer proceed first with its evidence with respect to the circumstances of hiring.

28. As part of this sixth ground (paragraph 21(6) of the submissions), counsel notes that the Board direction that the intervener company give evidence first “placed counsel for the intervener in a position of having to conduct an examination-in-chief of a representative of the intervener, after which counsel for the respondent union would be allowed to cross-examine such witness”. While we agree that this would be the effect of our direction, we cannot see in it anything improper, inappropriate, and more important for the issue at hand, anything demonstrative of an apprehension or reality of bias. Cross-examination was to be restricted to the circumstances of hiring. It is tautological to say that the effect of directing the intervener to lead its evidence first would be to place counsel for the intervener in a position of having to conduct an examination-in-chief of his

witness. If the employer is a proper party to these proceedings, albeit as intervener, it is a party with full rights to participation and full obligations of participation. Those obligations include the obligation that it is bound by the rulings of the Board and by any decision which the Board might ultimately issue. Mr. Bickford has not taken the position that the employer is not a proper intervener in these proceedings.

29. The seventh ground is that the Board direction that the intervener give evidence “is inconsistent with, and does violence to, normal procedures founded on procedural fairness and natural justice that the party making an objection must adduce any evidence which that party considers necessary so that the objection can be adjudicated”. Neither at the hearing (see paragraph 10 above), nor now in the written submissions, has counsel indicated how natural justice might be violated, nor has he indicated how our direction in this respect might give rise to a reasonable apprehension of bias.

30. The eighth ground suggests that the Board “by its actions, appears not only to have descended into the arena as a party, but also has given the appearance that the Board is determined to avoid having to consider the merits of the termination application”. Our comments above, and particularly in paragraph 22, are sufficient to dispose of this ground. Additionally, no comments or questions were made during the hearing that might have indicated such a descent or an apprehension of bias, nor does counsel refer to any in his thorough submissions. Neither does counsel allege he was not given full and complete opportunity to address all issues.

31. With respect to the allegation that the Board has given the “appearance that [it] is determined to avoid having to consider the merits of the termination application”, we will assume Mr. Bickford is suggesting the Board is intent on dismissing this application on a preliminary matter, and therefore is biased against the intervener employer. Counsel further submits “that this appearance would be a reasonable inference from the proceedings as described above, culminating in the action of the Board in directing counsel for the intervenor to conduct an examination-in-chief of a representative of the Intervenor”. We fail to see how a decision directing which party should proceed first in a proceeding is in any way demonstrative of a determination to avoid considering the merits of the application or of an apprehension of bias.

32. The ninth and last ground suggests that the Board’s actions considered in their entirety “leave the inescapable conclusion that the Board has concluded that the employees have no status to bring the application and have [sic] indeed decided the case even before it has begun.” Again, we note the absence of reference to any comment made by any member of the panel which might arguably be indicative of predisposition or bias. We have concluded that none of the actions referred to individually by counsel in the first eight grounds support a reasonable apprehension or perception of bias, and we have reached a similar conclusion with respect to the cumulative effect of the conduct of the Board. We see nothing in the events which could raise an apprehension of bias, only an apprehension that the Board was not persuaded by Mr. Bickford’s submissions.

33. Although counsel did allege in oral submission that the entire Board was biased, that point was not raised in written submissions and accordingly we have not further considered it.

34. Accordingly, for all the above reasons, the motion is denied and this panel will not disqualify itself on the grounds of bias or reasonable apprehension of bias.

35. This matter is remitted to the Registrar, to be rescheduled for further hearings in Thunder Bay, upon the agreement of counsel as to availability of dates.

3244-86-U Salvatore Di Cesare, Complainant v. Retail, Wholesale and Department Store Union, Local 414, Respondent v. Dom Group, Intervener

Duty of Fair Representation - Settlement reached between union and Domgroup following conversion of Dominion Stores into franchises known as Mr. Grocer stores - Complainant without job as a result of settlement - No breach of fair representation duty by union when reaching settlement - Union reached best settlement it could under circumstances

BEFORE: *Patricia Hughes*, Vice-Chair.

APPEARANCES: *Salvatore Di Cesare* on his own behalf; *James Hayes*, *Frank Reilly*, *Robert McKay* and *Loretta May* for the respondent; *M. Failes* and *B. Pearce* for the intervener.

DECISION OF THE BOARD; May 29, 1987

1. This is a complaint under section 89 of the *Labour Relations Act* ("the Act") in which the complainant, *Salvatore Di Cesare*, asserts that the Retail, Wholesale and Department Store Union, Local 414 ("the union" or "Local 414") has breached its duty towards him as set out by section 68 of the Act.

2. Section 68 states:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. The complaint states that Mr. Di Cesare filed grievances on March 19, 1986 and in September 1984 to which he had not received replies by the date of application. It also states that the union "failed to represent [the complainant], while acting in an arbitrary manner negotiating a settlement with Mr. Grocer" in that he was laid off while employees in Aylmer and Stratford with less seniority were working. The remedies requested are reinstatement, compensation for lost wages and benefits and reinstatement to the executive board of the union.

4. Mr. Di Cesare indicated orally that he believed the union had breached section 68 of the Act by removing him from the executive board of the union when he was terminated as a Dominion store employee in March 1986. The store at which he was working was closed on May 30, 1986, apparently one of the last of the Dominion stores to close. I ruled that I had no jurisdiction to inquire into whether Mr. Di Cesare should have been removed from the executive board since that is a matter internal to the union and does not extend to Mr. Di Cesare's relations with his employer: *Sylvia Colalillo*, [1982] Rep. July 1066; *Ontario Hydro*, [1980] OLRB Rep. July 1039; *Thomas Beck*, [1985] OLRB Rep. Jan. 14. (Nor does Mr. Di Cesare make any allegation of intimidation or coercion: *Frank Manoni*, [1981] OLRB Rep. Dec. 1775.)

5. At the hearing, Mr. Di Cesare also alleged that he should have been given the benefit of clause 2:12 of the collective agreement between the union and Dominion Stores Limited. That clause is a "super seniority" clause which gives preference to the members of the negotiating committee and union officers. He said that he had filed a grievance that he had been laid off contrary to clause 2:12, but there was no evidence of such a grievance before the Board. Nor did that allegation form part of the complaint. I ruled that insofar as the complainant intended this matter to form a distinct allegation it was untimely; however, to the extent that it formed part of the general complaint arising out of the Mr. Grocer settlement, I was prepared to hear evidence on it.

6. The union provided a copy of the March 19, 1986 grievance. This was a group grievance alleging "unjustified lay-off". This grievance relates directly to the "Mr. Grocer settlement" referred to below and was disposed of by the union pursuant to that settlement. I return to that issue below.

7. The September 1984 grievance (of which no copy was before the Board) was in relation to a notice received by Mr. Di Cesare that he would be laid off in November 1984. He was not laid off at that time but became an A Clerk. He had been a B Clerk, a position paying \$1.05 more an hour. He subsequently filed another grievance in November about that drop in position and loss in pay. A letter dated December 27, 1984, to A. Player of the union from J. A. Farmers, Personnel Manager of Dominion Stores for the relevant area, indicates in response to that grievance that "the company is in agreement to pay the Clerk 'b' wage rate from November 12, 1984 up to present". Mr. Di Cesare agreed that that grievance was resolved. Accordingly, this complaint is dismissed insofar as it relates to the September 1984 grievance.

8. That leaves the March 19, 1986 grievance. In effect, Mr. Di Cesare's complaint is that the union did not take him or his situation into account when it reached the settlement with Domgroup Ltd., among others. That settlement was the culmination of intensive litigation and discussion arising out of the conversion of many of the Dominion grocery stores into franchises known as "Mr. Grocer" stores. Although the Board issued two decisions in which it issued related employer declarations in relation to the franchise arrangement, in which the Mr. Grocer stores were supplied by Willett Foods Limited, a subsidiary of Dominion (*Penmarkay Foods Limited et al*, [1984] OLRB Rep. Sept. 1214 and *R. P. K. C. Holding Corporation*, [1986] OLRB Rep. June 828), the other franchisees were not bound by those decisions. The union's response to that situation was set out by the Board in *Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd. et al* (unreported, February 2, 1987):

8. The union's reaction was predictable. In order to protect its position and that of its unemployed members, the union launched unfair labour practice, successor rights, and related employer proceedings against each and every known franchisee, as well as Willett and Dominion. The union also filed numerous grievances against individual franchisees, alleging that those franchisees were bound by the Dominion agreement (either as related or successor employers). The union asserted that the franchisees were required to employ their workers in accordance with the terms of the agreement, and pay the specified wages and benefits. Where the particular franchisee had not maintained the pre-existing employee complement, the grievance demanded that the discharged workers be reinstated to their former jobs and compensated for their lost wages. Nor was this the end of the problem. Some *current* Mr. Grocer employees intervened in the proceedings to oppose the union's related employer/successor rights application, and, in addition, filed applications to terminate the union's bargaining rights at particular locations. The union's response, *inter alia* was that these employees should never have been employed in the first place, and therefore had no status to intervene or seek termination of the union's bargaining rights. (Emphasis in original)

9. A variety of parties embarked on what the Board in *Willett Foods, supra*, called "a proceeding of prodigious proportions". The complexity of that matter is described in the *Willett Foods* decision. The Board indicated that the union, no more than the other parties, welcomed that proceeding:

10. ...From the union's perspective, complete success before the Board would, in all likelihood, only be a necessary prerequisite for an even more protracted and laborious series of arbitration hearings. It was by no means clear, just whether or how the union could establish the entitlements of particular employees *vis a vis* one or more of the franchisees. The process could take years, and the potential recovery was uncertain, because there were, potentially, hundreds of *competing employee claims* which would have to be litigated and weighed in light of the employees' obligation to mitigate their losses and seek alternative employment. (Emphasis in original)

10. Although settlement was attempted, it was unsuccessful until Loblaw Companies Limited agreed to purchase Mr. Grocer conditional on the resolution of all outstanding labour relations and collective bargaining questions. The resulting settlement was contained in the *Willett Foods, supra*, decision and was described by the Board as follows:

13. The solution that the parties have devised is ingenious and novel in some respects, but it is one which they all affirm and unanimously urge the Board to endorse. We see no reason why we should not do so. Indeed, while it is not really necessary for us to express any opinion, one way or the other, we are inclined to observe that the proposed settlement represents a reasonable, practical, and (we hope) workable compromise of all of the competing union, employer, and employee claims. For this, all counsel are to be commended.

11. The result of all of this for Mr. Di Cesare was that he found himself without a job, although he had worked for Dominion for about twelve years. (He subsequently obtained other employment and he is now on the waiting list for a position at a Mr. Grocer store.) When he was made an 'A' clerk, he testified, he was told by union officials that it might take a year or two for these matters to be resolved. But in March 1986, there was an indefinite lay-off notice for his whole store. Nevertheless, he still had hope that the union would help him and he would be rehired by Mr. Grocer. He was "shocked", he said, to see in the paper that a deal had been made between the union and the other parties. He received a call from Tom Collins, a union official, who told him "you won't be forgotten"; however, the last time he heard from Mr. Collins, it was to hear that the agreement had been "endorsed" by the Board.

12. Mr. Di Cesare feels that the union did not fight for the Dominion employees but was concerned only for the new members it had gained through the Mr. Grocer franchises. He believes he had been a model for other employees but he received nothing in return, "not even a consideration".

13. In Mr. Di Cesare's view, the union should have fought to get preferential treatment for union officers and shop stewards in the new collective agreement. He believes the union had tried (unsuccessfully) to give special treatment to a local president in the sale of Dominion to A & P, but he adduced no evidence of that. He also believes the union should not have accepted the settlement but should have obtained protection for senior employees. He would have continued the litigation to the end. In addition, he contends that the union did not communicate adequately with him about what was happening and suggests he was not told the truth.

14. The question before me is not whether Mr. Di Cesare should have kept his job. It is not whether the union should have pursued an agreement or course of action which would guarantee Mr. Di Cesare a job. It is not whether the union reached the best agreement or whether there was something better to be had. The question is, rather, whether in its negotiations with the parties involved in this complicated affair, in the way it approached the litigation and in its reaching of the settlement, the union acted in a manner which breached its duty to Mr. Di Cesare as required by section 68 of the Act.

15. Mr. Donald Collins, the union's Canadian Director, was actively and extensively involved in the proceedings resulting in the Mr. Grocer settlement from the fall of 1982 to today. Mr. Collins testified about the complexity of the proceedings and about the union's overwhelming concern that it could end up with a "paper success" but no money. He stated that the union's initial position was that the Dominion collective agreement be honoured, requiring Mr. Grocer employees to be displaced by former Dominion store employees. The grievances relating to the lay-offs were part of the negotiations. The union became aware, as time passed, that Dominion was disposing of its assets; it appeared to the union that there would be little of Dominion left by the end of this process. The union considered it had little choice but to reconsider some of the firm

positions it had taken. In the end, the union was able to negotiate only certain benefits for former Dominion employees, including advertisements in the newspapers notifying them that they could apply for jobs at Mr. Grocer, a fund from which they could seek compensation and a collective agreement which the union considered inferior to the one it had had with Dominion.

16. Mr. Collins stated that the union conceded the issue of the reinstatement of former Dominion employees because the franchisees would not have entered the agreement without such a concession. Rather than engage in lengthy and expensive litigation with a strong possibility of a paper victory at best, the union agreed to the Mr. Grocer settlement.

17. The union filed a grievance dated October 19, 1984, that the terms and conditions of employment of persons employed at certain Mr. Grocer stores were governed by the collective agreement in effect between the union and Dominion. Because of the proceedings before the Board, the union sought an adjournment of the arbitration proceedings; that adjournment was granted: *Dominion Stores Limited* (Weatherill) (July 8, 1986). By clause 2 of the Mr. Grocer settlement "the Unions [various locals of the Retail, Wholesale and Department Store Union, including Local 414] hereby withdraw any and all grievances filed under collective agreements between the Unions and Domgroup alleging violations of such collective agreements by Domgroup and/or the Participating Franchisees relating to the Business [the franchise business carried on in Ontario by the Mr. Grocer division of Willett Foods Limited]". Domgroup agreed to pay the union \$7 million, in part to pay former Domgroup employees.

18. I am satisfied that the union attempted to reach the best settlement it could under the circumstances. Union decisions often have a negative impact on a particular group of employees but that does not automatically mean that the union has breached its duty under section 68: *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35. In this case, the union believed abandoning grievances involving former Dominion store employees, including Mr. Di Cesare was necessary to the settlement. The overall cost of pursuing this particular problem would have been too great. The union had to balance gains and losses. That no doubt seems harsh to Mr. Di Cesare, but such a result in itself does not contravene section 68.

19. There was some evidence that the communication of the settlement by the union to the employees, or at least to Mr. Di Cesare, was somewhat wanting. Even if that is the case, communication after the relevant decisions have been made in the circumstances of this case does not constitute a violation of section 68 (Cf. *Jean Liebman*, [1986] OLRB Rep. June 753).

20. Accordingly, this complaint is dismissed.

1856-83-R; 2087-83-M Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant v. **E K T Industries Inc.**, Respondent v. International Union of Operating Engineers Local 793, Intervener #1 v. United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Intervener #2 v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, Intervener #3; Labourers International Union of North America, Ontario Provincial District Council; and Labourers International Union of North America, Local 607, Applicants v. v. **E K T Industries Inc.**, **Tamarron Group Inc.**, **Tamarron Construction Limited**, Respondents

Bargaining Rights - Construction Industry - Reconsideration - Effect of earlier decision to call into question applicant's bargaining relationships with several employers - Stay requested pending full reconsideration and application to Minister for designation - No legal requirement that power of reconsideration be exercised by the panel making the original decision but no grounds here to reconsider, vary, revoke or stay the original decision

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *M. Eayrs* and *N. Wilson*.

APPEARANCES: *L. C. Arnold* for Lumber and Sawmill Workers Union, Local 2693; *S. B. D. Wahl* for Labourers Local 607; *R. J. McComb* for **E K T Industries Inc.**; *N. Jesin* for Carpenters Local Union 1669 and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; no one appearing for the other parties listed in the styles of cause.

DECISION OF THE BOARD; May 25, 1987

1. This is an application to reconsider and "stay the operation of" a decision of the Board (differently constituted) released on March 27, 1987 [now reported at [1987] OLRB Rep. Mar. 352]. The request is made pursuant to section 106(1) of the Act which reads as follows:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Carpenters Local 2693, the Carpenters Ontario District Council, and **E K T** all urged the Board to grant this request for reasons set out more particularly below. Labourers Local 607 opposes the application on the ground that the Board has no jurisdiction to grant the relief requested; and, in any event, no such relief is warranted in the circumstances of this case.

2. In order to appreciate the context in which this application arises, it is necessary to sketch in some background. Much of this information is canvassed in, or flows from, the original Board decision, however it is useful to repeat it here.

II

3. These proceedings began as an application for certification in which Local 2693 sought to obtain or confirm the right to represent certain employees of **E K T**. Labourers Local 607 intervened in that application. Subsequently, each trade union sought to establish its bargaining rights

pursuant to section 63 and/or section 1(4) of the Act. Local 2693 claimed that E K T was the successor of, or related to, a firm called "Kamtar" with which Local 2693 purportedly had a collective bargaining relationship. Local 607 claimed to represent construction labourers employed by E K T by virtue of its provincial agreement with the Tamarron Group Inc. ("Tamarron"). Those competing claims were consolidated and heard together. In the course of the hearing the Board was invited to consider what the parties described as the "affiliated bargaining agent issue". At paragraph 3 of the decision the Board put it this way.

In the course of hearing the evidence and representations of the parties on these section 63 and 1(4) matters, counsel for Labourers Local 607 raised certain issues with respect to the status of Lumber and Sawmill Workers Union, Local 2693 to apply for or hold the bargaining rights in question. The issue raised by counsel stems from whether or not Lumber and Sawmill Workers Union, Local 2693 is an affiliated bargaining agent as defined by section 137(1)(a) of the Act. If it is such an affiliated bargaining agent, then the question arises whether that affects Lumber and Sawmill Workers Union, Local 2693's status given those sections of the Act dealing with the mandatory provisions concerning province-wide bargaining for certain trade unions in the construction industry. The intervening trade unions in these proceedings played an extensive part in that portion of the proceedings dealing with the "affiliated bargaining agent issue".

4. The hearings before the original panel of the Board ("the Franks panel") consumed some 37 days. There was extensive evidence and argument concerning the bargaining history of Local 2693 and whether at the time of its applications, it was an affiliated bargaining agent ("ABA") pursuant to section 137(1) of the Act. For reasons set out at paragraphs 14-41 of the Franks decision, the Board concluded that Local 2693 was an ABA and that, therefore, it was not entitled to represent construction labourers employed by E K T, because of the statutory scheme regulating collective bargaining in the industrial, commercial and institutional (ICI) sector of the construction industry. Local 2693, does not appear among that "family" of ABAs appearing on the Ministerial designation specifying those ABAs represented by the Carpenters' Provincial Employee Bargaining Agency (see section 139 of the Act), or on any other Ministerial designation for that matter. The Board reasoned (and the parties herein do not dispute) that unless Local 2693 appeared on the designation, it could not engage in ICI collective bargaining for E K T's construction labourers - regardless of its past practice. The Board further observed that any collective agreement affecting employees in the ICI sector other than the provincial collective agreement between the designated employer and employee bargaining agencies would be deemed to be void under section 146 of the Act which reads as follows:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

5. In the result, the Board dismissed Local 2693's claim for bargaining rights, on the basis that it was inconsistent with the statutory scheme and would necessarily involve an arrangement deemed by the statute to be illegal and void. The Board further found "on the merits" (and this may be particularly significant for such bargaining rights as may exist outside the ICI sector) that Local 607 had a stronger successor rights/related employer claim than Local 2693. Although the

decision does not explicitly say so, it is implicit that the applications of Local 2693 were dismissed, in their entirety, and the applications of Local 607 granted.

6. What is the effect of the E K T decision? Again, this is not really disputed. The narrow result is to establish Local 607's bargaining rights for construction labourers employed by E K T, and to bring E K T and those employees into the provincial bargaining scheme which regulates the terms and conditions of employment for construction labourers employed by "ICI employers" across Ontario. The Board's decision necessarily affects only E K T. It does not purport to affect the rights of any other employees or employers, or any other bargaining relationships.

7. However, for Local 2693 the implications were ominous. If the reasoning of the Franks panel were accepted and applied to other employers in circumstances similar to E K T, a number of Local 2693's bargaining relationships might be called into question. Indeed, that is not just an academic concern because there is currently pending before the Board an application under section 135(2a) of the Act, brought by certain construction employers in the Thunder Bay area, seeking clarification of their bargaining obligations/collective agreements in light of the E K T decision. Section 135(2a) provides:

Where, on the complaint of an interested person, trade union, council of trade unions, employers' organization, employee bargaining agency or employer bargaining agency, the Board is satisfied that a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency, bargained for, attempted to bargain for, or concluded any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 146(1), it may direct what action, if any, a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations, or employer bargaining agency, shall do or refrain from doing with respect to the bargaining for, the attempting to bargain for, or the concluding of a collective agreement or other arrangement other than a provincial agreement as contemplated by subsection 146(1).

That is why Local 2693 seeks reconsideration of the Franks panel decision, urges the Board to grant a "stay" pending that reconsideration, and, in addition, has requested the Minister of Labour to amend the designation, *retrospectively*, to make it clear that *Carpenters* Local 2693 is entitled to represent construction *labourers*. (Whether the Minister can or should do so we need not here determine. It suffices to say that he has referred that question to the Board pursuant to section 139(4) of the Act).

8. Local 2693 contends that the Board should give careful consideration to the fact that it has held bargaining rights for construction labourers in northwestern Ontario for many years and that those bargaining rights have, heretofore, been unchallenged. The E K T decision, although strictly speaking applying to only one company, represents a marked departure from the parties' perceptions of the preexisting legal status quo. It calls into question Local 2693's right to represent between 200 and 400 construction labourers (depending upon the level of local construction activity). Given the potential consequences if the E K T reasoning is applied in other circumstances, Local 2693 argues that the Board should "stay" the result of E K T pending a full reconsideration and/or a review by the Minister pursuant to his authority under section 139 of the Act to revise the designation orders.

9. Counsel contends that it would not be conducive to orderly collective bargaining in northwestern Ontario if the Board were to follow the E K T reasoning in other cases, only to find that reasoning rejected on an application for reconsideration, or effectively reversed by a change in the ministerial designation(s). There are currently several certification applications pending before

the Board in which Local 607 seeks to displace Local 2693 as the purported bargaining agent for construction labourers in the Thunder Bay area, and counsel points out that these applications would be dealt with quite differently if it were determined that Local 2693 was not an "incumbent union" with valid bargaining rights capable of being displaced. Similarly, the employers' challenge under section 135(2a) might be entirely academic and unnecessary if it were definitively determined (one way or the other) that Local 2693 was not entitled to represent construction labourers. Local 2693 maintains that there is a good argument to be made that the Franks panel was wrong in law, but prefers to make that argument either before the panel hearing the reconsideration, or before the Court on an application for judicial review. Here it seeks only a "stay". E K T adds that it may be facing conflicting legal obligations and potential liability until the situation is clarified and finalized. In E K T's submission the convenience of other parties potentially affected, and of the Board itself, support a "stay".

10. Counsel for Local 607 points out that *the parties agreed* to have the Board determine the affiliated bargaining agent issue, and Local 2693 must now live with the result which the statute makes "final and conclusive for all purposes". There was ample opportunity during the three years this matter was before the Board for E K T or the Carpenters to approach the Minister to seek rectification of what is now characterized as an unfortunate omission from the designations, prejudicial to historic bargaining patterns in northwestern Ontario. Counsel further points out that all of the issues raised before this panel of the Board were put before the Franks panel - including the question of whether that panel should postpone the effective date of its decision until such time as Local 2693 had the opportunity to petition the Minister for a change in the designation. The Franks panel chose not to do so. Thus, we are being asked to reconsider the very argument which the Franks panel implicitly rejected.

11. Local 607 argues that there is nothing in the material before the Board to indicate that Local 2693 or E K T wish to lead any evidence which was not available by reasonable diligence during the extensive hearings, nor does Local 2693 set out any new legal submissions which were not, or could not have been, made before the original panel. The objecting parties do not contend, nor can they, that the parties did not have a full and fair hearing before the Board, and a complete opportunity to present all of their evidence and make all of their legal submissions. Accordingly, Local 607 contends, the objecting parties do not meet the standards which the Board has prescribed for the exercise of its discretion under 106(1) of the Act. (See: *Detroit River Construction Limited*, 63 CLLC ¶16,260; *International Nickel Company of Canada*, 63 CLLC ¶16,284; *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. Sept. 609; *Canadian Union of General Employees*, [1975] OLRB Rep. April 320; *York University*, [1976] OLRB Rep. April 187; (1977) 19 O.R. (2d) 226 (Divisional Court) - application for judicial review dismissed; *Lorain Products (Canada) Ltd.*, [1978] OLRB Rep. March 262; *Ontario Precast Concrete Manufacturers' Association*, [1978] OLRB Rep. March 284; *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185; *The Corporation of the City of Ottawa*, [1982] OLRB Rep. Nov. 1698; and, generally, G. W. Adams, Q.C. *Canadian Labour Law*, (1985) Canada Law Book at p. 141).

12. Local 607 concedes that the situation is fluid, but points out that it already has several certification applications pending before the Board and the rights of its members may be equally prejudiced if it is foreclosed from relying upon the E K T precedent. Employees who have opted for representation by Local 607 may find their wishes delayed and frustrated, for, in labour relations, time is of the essence - especially in the construction industry. Counsel further maintains that, *as a matter of law*, it cannot be so foreclosed by a "stay" issued in this matter, because other parties are no more bound by a decision of this panel of the Board than they would be by the Franks decision. Finally counsel contends that this panel of the Board has no jurisdiction to, and should not, "second guess" the Franks panel. If there is to be a reconsideration of that decision, in

whole, or in part, or a “stay of its effect” that is a matter which should be canvassed before the Franks panel itself - particularly since the matter was already raised in that forum and the Franks panel decided not to accede to Local 2693’s request. The Franks panel, having heard the evidence and argument on the point, would be in the best position to determine whether the additional element - the request to the Minister for a change in the designation - would prompt it to delay implementation of its decision.

DECISION

13. Section 106(1) of the Act confers upon the Board a plenary independent power to reconsider, vary, or revoke any earlier decision if the Board considers it advisable to do so. In exercising that authority, the Board is not restricted to a consideration of the facts as they existed at the time of the original order and may consider any new or subsequent facts which it deems relevant. In appropriate circumstances, and with due regard to the principles of natural justice, that power of reconsideration may be exercised by a differently constituted panel of the Board. If it were otherwise, reconsideration would not be available to a party if, after the release of the decision, a panel member died or was otherwise unwilling or unable to act. No doubt it is convenient and prudent to have the original panel reconsider its decision because that panel will be in the best position to know the evidence and argument that was before it and to decide whether its decision should be varied. Indeed, if the request for reconsideration involves a challenge to the Board’s factual findings or reference to the evidence before the Board, the case may have to go back before the original panel because, in the absence of a transcript, there is no way that anyone else would be in a position to address those issues. If another panel tried to deal with the matter it might be drawn into what is, effectively, a trial *de novo*, which would seriously undermine the finality of the decision which section 106 itself contemplates. Leaving aside the nature of the hearing which might be required, however, we do not think there is any absolute legal requirement that the power of reconsideration can only be exercised by the panel making the original decision. Moreover, here, we are not asked to reconsider or reject the factual or legal conclusions of the Franks panel; we are only asked to temporarily stay the operation of its decision until Local 2693’s other legal options have been explored.

14. On the other hand, we are not persuaded that it is either necessary or desirable to stay the Franks decision. Based on the facts, as found, (which the applicants for a stay do not here contest), they are only able to say that there is an argument that the decision may be wrong. They do not, and in our opinion cannot, argue that there is a strong *prima facie* case that this is so. They can plausibly argue that the decision exposes a potential problem from their point of view because, if the designation order is not amended, Local 2693’s bargaining rights for other companies may be subject to attack. But that is only to say that the Board should grant a stay because they claim the decision is wrong or because the law, as it is, is not as Local 2693 and its supporters would like it to be. That cannot be a basis for reconsidering or staying a Board decision. The same claim can be made in virtually every Board case. Nor can we give much weight to the Carpenters’ contention that they thought the case would turn out differently and that the *status quo* would be maintained. That belief may be understandable, but the fact is that the provincial bargaining scheme established in 1978 is based significantly on established craft/trade distinctions, and, within that context, it is not so surprising that the Board might conclude that a local of the Carpenters’ union would not be entitled to represent construction labourers, who, under the provincial bargaining scheme (and elsewhere in Ontario) are represented by the Labourers’ union.

15. It is also interesting to note that the Board is not required to, and does not bring its proceedings to a halt even when its jurisdiction is challenged on an application for judicial review (see *Re Cedarvale Tree Services Ltd. and Labourers International Union of North America, Local 183 et*

al., [1971] 3 O.R. 832). An aggrieved party must seek relief from the Court by way of a judicially imposed 'stay' pending judicial review. If the Board does not bring its proceedings to a halt when its very jurisdiction is challenged in Court, why should it do so simply because Local 2693 asserts that the Franks panel was "wrong", or because Local 2693 *may* be able to persuade the Minister to alter a designation order so as to preserve the anomaly in northwestern Ontario of a Carpenters ABA representing construction labourers, and the Minister *may* have jurisdiction to do so retrospectively so as to revive or "breathe life" into bargaining relationships which, as things now stand, are *deemed* by the statute to be illegal. (Again, we make no comment about whether the Minister can or should do so.) Assuming, as we do, that the Board has the power to "stay" its own decisions, it is a power which should only be exercised in truly exceptional circumstances, and if it is to be exercised by a different panel of the Board the circumstances must be even more extraordinary (bearing in mind that similar relief is available from a Court on an application for judicial review, with the added safeguard of judicial discretion and "costs".) Otherwise expedition and finality would be seriously prejudiced.

16. We accept the submission that the E K T determination, if followed by other panels of the Board in other proceedings may lead to a result contrary to the interests of Local 2693. But there is nothing particularly unusual about that. Whenever the Board makes a significant legal determination there is the possibility that it will set a precedent which will be followed by other panels. More telling, though, is Local 607's argument that any stay granted of the E K T decision cannot foreclose another panel of the Board considering the reasoning of the Franks panel or coming to the same conclusion, nor would it foreclose Local 607 from raising the matter. There are practical and institutional reasons why the Board should not encourage continued litigation on the same point; however, the Board is not strictly bound by the doctrine *stare decisis*, (See: *re Medi Park Lodges Inc. and Ontario Nurses Association and O.L.R.B.* - unreported decision of the Divisional Court dated November 3, 1981) and it is open to other parties to argue either that the original decision was wrong on the basis of the facts as found, or that there is other evidence not put before the original panel which might prompt another panel to reach a different conclusion. In the result then, any purported "stay" of the Franks decision would not put an end to litigation, but would merely prompt Local 607 to mobilize the same evidence and mount the same argument that was made successfully before the Franks' panel. And, of course, we cannot ignore the collective bargaining reality in northwestern Ontario where two unions - Local 2693 and Local 607 - are now engaged in active competition to represent construction labourers. Any determination which advances the interests of one union and its supporters necessarily retards the interests of the other union and its supporters. Thus, for example, at E K T, Local 607 has now established bargaining rights for construction labourers so that available work opportunities will now be distributed among its members. Conversely, if the E K T decision is stayed, work opportunities will presumably go to members of Local 2693. The balance of convenience does not obviously point in either direction; and there is certainly no undertaking that Local 2693 will contribute to any subsequent compensation claim made on behalf of members of Local 607. Finally, we are constrained to note the observation in paragraph 17 of the Franks decision that, over the years, Local 2693 has been "less than candid" with the Board when obtaining the bargaining rights which it now seeks to defend. It purported to acquire bargaining rights for all unrepresented tradesmen when, in fact, it really only wanted to represent labourers.

17. For the foregoing reasons, this panel of the Board is unanimously of the view that the decision released on March 27, 1987 should not be reconsidered, varied, revoked or stayed.

2728-86-FC United Food and Commercial Workers International Union, Applicant v. Formula Plastics Inc., Respondent

First Contract Arbitration - Employer refusing to agree to just cause clause in collective agreement - Union engaging in unsuccessful strike - Bad faith bargaining complaint by union dismissed - Whether employer's position was without reasonable justification - Board assessing whether proposal was reasonable in objective terms - Section 40a requiring a departure from bad faith bargaining jurisprudence - Settlement of first contract directed

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. Sarra* and *R. M. Sloan*.

APPEARANCES: *Paul Timmins* and *David MacMillan* for the applicant; *F. J. Matthews* and *Elliot L. Berger* for the respondent.

DECISION OF JUDITH McCORMACK, VICE-CHAIR, AND BOARD MEMBER J. SARRA;
May 27, 1987

1. This is an application under section 40a of the *Labour Relations Act* for a direction to settle a first contract by arbitration.

2. On March 31, 1987, the Board issued the following decision:

The majority of the Board finds that the process of collective bargaining has been unsuccessful in this matter because of the uncompromising nature of a bargaining position adopted by the respondent without reasonable justification. We therefore direct the settlement of a first collective agreement by arbitration. Our reasons will follow.

We now provide our reasons.

3. The respondent in this matter operates a small manufacturing plant in which some twelve employees make extruded plastic film. The applicant was certified as a bargaining agent for those employees on September 21, 1984.

4. Notice to bargain was given by the union to the employer in October of 1984. The first negotiating meeting between the parties was scheduled in January of 1985, and in December of 1984, the union sent a comprehensive package of proposals to the employer in preparation for that meeting.

5. At the January negotiating session, the parties agreed on a number of ground rules for bargaining, including the stipulation that non-monetary issues would be addressed first. The employer's counsel, F. J. Matthews, acted as its negotiating spokesperson, while the union committee was headed by Dave MacMillan, one of the union's international representatives. The employer notified the union at that time that it would be tabling a document containing its own proposals on contract language shortly.

6. At the next negotiating session, the employer submitted a set of counterproposals on non-monetary items. The parties agreed to work from the employer's proposals and a clause by clause discussion ensued. Considerable progress was made and a number of articles were agreed upon. However, it was also becoming clear that the parties were apart on the following proposal submitted by the employer:

8.08 An employee who has acquired seniority may only be discharged upon the following terms:

- (a) for just cause;
- (b) upon payment of pay in lieu of notice in the following amounts:
 - (i) less than one year's seniority - pay of one week in lieu of notice;
 - (ii) after accumulation of one year seniority - two weeks' pay plus one additional week's pay for each full additional year of seniority.

7. By the time of the third negotiating session on March 6, 1985, the dispute with respect to this clause had crystallized further. All other non-monetary proposals submitted by the employer had been agreed upon, either in their original form or as amended by the parties. Mr. MacMillan asked for some clarification of Article 8.08 which, when provided by Mr. Matthews, demonstrated that the purpose of the article was to allow the employer to discharge an employee without just cause upon payment in lieu of notice. Mr. Matthews confirmed at that time that clauses (a) and (b) should be read as having an "or" between them.

8. Mr. MacMillan then outlined a number of concerns he had about the impact of such a clause on the job security of employees. In his view, the existence of clause (b) as interpreted by Mr. Matthews, would essentially negate clause (a). He told Mr. Matthews that the clause would mean that an employer could circumvent the grievance procedure, as even an employee who had successfully arbitrated a discharge grievance could subsequently be terminated upon payment of one or two weeks' pay. As far as Mr. MacMillan was concerned, if the union accepted such a clause, it would have in essence given up its right to represent its members. He made it clear to Mr. Matthews that the union would never agree to 8.08(b). Subsequently, the employer filed for conciliation with the union's agreement.

9. In May of 1985, the parties met in conciliation in a session which focused almost entirely on 8.08(b). Mr. MacMillan candidly admitted that the union was unwilling to deal with other issues until the just cause issue was resolved. By this strategy, the union hoped to put pressure on the employer to respond to the union's concern about 8.08(b). The employer declined to change its position on the clause, and the union requested a no-board report.

10. The parties attended a mediation meeting several weeks later which was very similar to their conciliation experience. Again it was clear that 8.08(b) was the stumbling block, and that neither party was prepared to change its position. The union also alleged before us that at that time the employer had declined to provide a full offer, including monetary proposals, to the union. The employer argued that this point was *res judicata* as it had been addressed by the Board in an earlier decision resulting from a bad faith bargaining complaint brought by the union. (See *Formula Plastics Inc.*, [1986] OLRB Rep. July 954.) In view of our ultimate decision in this matter, we do not find it necessary to deal with either the *res judicata* argument or this factual dispute.

11. On the same day the mediation meeting was held, the employer sent the following letter and statement to Mr. MacMillan. The union alleges that the statement was also sent to individual employees:

Dear Sir:

RE: Formula Plastics and Local 326

In view of the pending strike deadline we are writing to you concerning the following matters:

- a) A statement from management concerning its position at this time is enclosed.

In your deliberations with the employees we would request that you present this statement as a means of fairly communicating managements [sic] position at this time.

b) I am sure that you can appreciate that management does not want a strike. The company can appreciate that the employees don't wish one either. If work stoppages do become necessary we would like the opportunity to consult with you about appropriate arrangements for an orderly wind down of the companys [sic] operations in the event of a contemplated work stoppage. Ultimately the relationship between the parties will have to be resolved on some mutually acceptable basis and we suggest therefore that it would be desirable [sic] to minimize any unnecessary damage to the relationship.

Yours very truly,

TO THE EMPLOYEES OF FORMULA PLASTICS

(Statement of Company Management)

The management of Formula Plastics have as you know been carrying on negotiations with your Union Bargaining Committee for some time.

It is difficult, particularly in these times, to produce, through negotiations, results which will make either workers or management completely happy. We have however been able to agree in principal with your Bargaining Committee on a variety of matters which are intended to and should produce an improved working relationship between the company and yourselves and make Formula Plastics a more effective and better place to work for future years.

Since bargaining commenced the following provisions have been instituted or agreed upon.

- a) The institution of an employees [sic] group benefit plan paid for at the companys' [sic] expense;
- b) The appointment of shop stewards to represent the workers [sic] interests;
- c) A grievance and arbitration procedure to settle any disputes which may arise during the course of work;
- d) A provision to recognize seniority accumulated by long term employees;
- e) Provisions to distribute fairly amongst employees job promotions, job transfers, lay offs [sic] and recalls;
- f) Establishment of a Health and Safety Committee;
- g) Establishment of a Union and Employee bulletin board;
- h) Provisions for the granting of leaves of absence to employees.

Your representatives will be able to explain the details of these provisions to you.

Unfortunately it appears that an impasse has been reached with your bargaining committee over the right of the company to terminate employees upon payment of severance pay.

The company has requested that it continue to have the right to adjust its work force by being able to terminate employment whenever it appears to management to be necessary for the best interests of the business in which we are all employed.

In the absence of a specific just cause, however, managements [sic] right of termination could only be exercised upon payment of appropriate severance pay. You may be aware that the Ontario Employment Standards Act gives you certain rights to notice upon termination of your employment.

In effect, the company has offered severance pay equivalent to substantially more than what is provided under the Employment Standards Act. What the company has offered amounts basically to one weeks [sic] pay, plus one additional weeks [sic] pay for each year of service accumulated up to the time of any proposed termination. For example, an employee who had worked for the company for four years could not be released without payment of at least five weeks [sic] severance pay. Under the Employment Standards Act provisions that employee would only be entitled to two weeks [sic] pay.

While the company feels that these notice provisions are fair it has also indicated to the Bargaining Committee that it is prepared to listen to adjustments to the proposed severance period.

You might ask why we are insisting on this clause, NO - we have no dark sinister intentions like firing someone because we don't like his face or because he has bad breath. Even if we wanted to, you can see that the severance pay requirements would make that action very expensive.

We want it for your own benefit - for the benefit of all honest employees who try their best and pull their weight.

Picture this for a moment - Someone is hired and seems to work fine until after his probationary period is over. Then he changes his attitude entirely, becomes lazy, sloppy, uncooperative and in general has a poor attitude which does not fit in with the others on his shift. You, his co-workers end up having to work twice as hard to do his job.

Without the severance clause that we want, it would take many months and thousands of dollars to correct this situation. It would take formal letters of discipline and a costly and time consuming [sic] arbitration hearing (like a court case) requiring you, his co-workers to testify, and attempt to describe to arbitrators (judges) who have never worked with extruders, the aggravation and frustrations you are having with this person. In our opinion, this is not workable for our Company.

This Company has been in operation for just over 1 year. We are still struggling [sic] to make ends meet and hoping one day to make a profit.

To succeed will take a team of dedicated and skillful operators and helpers. We will do everything we can to attract this calibre of person for the long term by offering improved benefits and pay as the company grows and becomes more profitable.

You will shortly have to give consideration to our position. You will have to decide whether it is acceptable to you and whether it is consistent with what you feel is in your long term best interests. Specifically you are going to have to decide whether to exercise your right to strike or to come to work. We would ask only that you recognize that we are sincere in addressing you and that you give consideration to our position as it is expressed to you in this statement.

In the event that you do exercise your right to strike we would warn you, for your own benefit of the following circumstances:

a) Employees away from work on strike will not be eligible to receive the benefits of the group insurance plan. Coverage will cease at the time when the employee ceases to work and therefore anyone on strike should make arrangements to obtain their own independent coverage if desired. There may be a waiting period as well to requalify upon return to work.

b) OHIP payments in respect of employees who are on strike will not be remitted directly by the company for the period that the employee is on strike. It will therefore be necessary for each employee affected to make his own arrangements to have the OHIP payments for he and his family paid directly to OHIP.

Management has no intention of causing the company to be shut down or locking out the employees. Management intends to do everything it can to ensure that operations continue in as orderly a fashion as possible. If you choose to come to work your pay and benefits will continue. We sincerely hope that you will choose to do so.

12. The statement makes it clear (and this was confirmed in cross-examination by Mr. MacMillan) that the employer was prepared to move on 8.08(b) but only with respect to the amount of payment in lieu of notice. Since this did not address the union's concerns about job security, the union was not interested in exploring this approach.

13. A strike vote was held and a legal strike commenced on June 21, 1985. It was evident from both Mr. MacMillan's testimony and the employer's letter that both sides conceived of the strike as focusing on 8.08(b). Active picketing took place for some two months, tapering off by August. During this period, the union filed the complaint referred to earlier, alleging that the employer was not bargaining in good faith and in violation of section 15 of the *Labour Relations Act*. Among other things, the complaint alleged that the employer had not presented its position on monetary issues. After it was filed, the employer sent a letter to the mediator with a copy to the union referring to the complaint, and setting out its monetary position as "the current wages and other monetary benefits".

14. On August 30th, the parties met again in mediation. Clause 8.08(b) was discussed without success, and little else was accomplished. By that time, two employees had returned to work and the remainder were no longer picketing.

15. A series of hearings into the bad faith bargaining complaint were held, culminating in a decision by the Board dated July 4, 1986, in which the union's complaint was dismissed. It appears that during this period, the parties did little to attempt to resolve their differences as they were waiting for the decision on the complaint.

16. In December of 1986, the union filed the instant application. The employer requested an adjournment with the union's consent, and the parties agreed to extend the time limits under section 40a. In the interim, an application for a declaration terminating the union's bargaining rights was filed.

17. The parties met again in mediation on February 17, 1987. Their respective positions on 8.08(b) were unchanged and little progress was made. The employer did agree to the union's request to provide a full package of proposals, including monetary items, to the union by a particular deadline. However, no such package was provided.

18. These proceedings were resumed at the request of the union and scheduled to be heard together with the termination application. The termination application was dismissed on March 2, 1987 because the applicants failed to appear at the hearing. (See *Formula Plastics Inc.*, Board File 2898-86-R, unreported, March 5, 1987.)

19. The union alleges that this sequence of events discloses that the conditions stipulated in sections 40a(2)(a), (b), and (c) have been met. Section 40a(1) and (2) provides as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;

- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

20. The Board set out its analysis of these provisions in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005 as follows:

i) “The *process* of collective bargaining”. The use of the word ‘process’ imports into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those postures most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons. This does not intend to suggest that the applicant’s conduct will be a bar to the imposed settlement of a first contract, but rather that its conduct is relevant in assessing the reason for the failure of the process.

ii) “The process ... has been unsuccessful *because of...*”. This language makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer’s refusal to recognize the union’s bargaining authority, the respondent’s unreasonably uncompromising bargaining proposals, the respondent’s dilatory or unreasonable efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a case-by-case analysis of whether there is a causal connection between the “reason” in question and the failure of the collective bargaining process.

iii) “Irrespective of whether section 15 has been contravened”. Section 15 of the *Labour Relations Act* imposes the duty to “bargain in good faith and make every reasonable effort to make a collective agreement”. The reference to section 15 in this way can only be interpreted as making a distinction between bad faith bargaining and first contract assessments. The Board is not to be bound by whether or not the conduct complained of violates section 15. Given the Board’s jurisprudence pursuant to section 15, wherein the Board has held that hard bargaining is not necessarily bargaining in bad faith (*T. Eaton Company Limited* [1985] OLRB Rep. March 491; *Radio Shack* [1985] OLRB Rep. Dec. 1789), one is left with the inescapable conclusion that the legislature has intended a different standard to apply in the determination of first contract disputes, a standard peculiar to section 40a adjudications. This does not suggest that contravention of section 15 is irrelevant. A contravention of section 15 may well be a factor to consider in assessing why the process was unsuccessful. But the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a. Hard bargaining may not violate section 15, but rigid bargaining proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement.

21. Turning first to the union’s allegations with respect to section 40a(2)(b), we note that the employer expressly conceded both that collective bargaining had broken down, and that it had broken down as a result of the deadlock over 8.08(b). We must therefore consider whether the employer’s adherence to 8.08(b) was “uncompromising” and “without reasonable justification”.

22. There can be little doubt on the evidence before us that the employer’s position was uncompromising. The only area of flexibility indicated by the employer was in regard to the

amount of pay in lieu of notice. This did not address the union's apprehensions with respect to the job security of employees, and was essentially peripheral to the real dispute embodied in the clause. While counsel for the employer suggested that the clause might have been acceptable to the union had the payment in lieu of notice provisions been generous enough, he used as an example a figure of \$50,000. We find this of little assistance where there was no evidence that the employer was prepared to agree to figures in this range which might provide a type of *de facto* job security. We note that the employer chose to call no evidence at all with respect to the parties' negotiations.

23. In any event, the employer maintained the same position on 8.08(b) for over two years through the course of a strike directed primarily at this clause, a bad faith bargaining complaint which had 8.08(b) as its subject, and throughout the instant proceedings which were chiefly centered around this provision. Under the circumstances, the respondent's position can be fairly characterized as uncompromising.

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board's analysis in *Nepean Roof Truss*, *supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board's interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has evolved under section 15.

28. The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a

delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

29. With this in mind, we turn to the employer's justification as set out in the statement directed at employees. It appears from the evidence before us that this statement represents the only occasion throughout the entire course of bargaining, and up to and including the present proceedings on which the employer advanced any justification for 8.08(b).

30. The employer sets out that it would be costly and time-consuming to be constrained by a system of progressive discipline and arbitration in discharge cases. We have no doubt that the employer would prefer to avoid this kind of structure, and there is little question that arbitration can be expensive and time-consuming. However, these concerns must be balanced against the job security of employees, one of the more fundamental rights that employees seek to obtain through collective bargaining.

31. Laskin, J. A. noted in *Regina v. Arthurs, Exp. Port Authur Shipbuilding* (1967), 62 DLR (2d) 342, [1967] 2 O.R. 49, 67 CLLC ¶14,024 that the employment security provided by seniority and discharge provisions in a collective agreement is essential to the distinction between the common law and a regime of collective bargaining:

...it is sometimes forgotten that collective bargaining and the collective agreement have given the individual worker security of continuing employment, depending by and large only on his seniority in relation to the employer's production needs (in terms of numbers of workers and their skills) and on his good behaviour which avoids giving just or proper grounds for discharge. What are generically called seniority and discharge clauses represent the employees' charter of employment security; and it is reinforced by removing from the employer, not his initiative in acting against an employee, but his previously unreviewable right to rid himself of employees, even if it cost money damages to do so.

32. The Board has commented on the importance of this kind of security in another context in *Swing Stage Limited*, [1983] OLRB Rep. Nov. 1920:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their termination reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

33. For these reasons, discharge has sometimes been referred to as "industrial capital punishment". As one labour commentator notes (Weiler, P. *Reconcilable Differences*, (1980) p. 138):

At several points on earlier pages, I have touched on the reasons why the protection against unjust dismissal is perhaps the critical job interest provided by the collective agreement. Especially in the case of the long service employee, being fired as a result of an immediate *contretemps* with his employer can have a devastating impact on his life. Not only is it difficult for older workers to find another job of any kind, but it is just about impossible to replace the benefits and amenities that are associated with lengthy seniority. It is for precisely that reason

that the arbitration process has developed a broad remedial authority which requires that employees be given credit for their earlier service records, that employers follow systems of progressive discipline, that they be sparing in the use of discharge instead of suspension (even for serious offenses such as deliberate insubordination, a physical altercation with the foreman, or dishonesty). *That body of industrial jurisprudence which has civilized the use of management's ultimate authority over workers is at the heart of the case for collective bargaining.*

[emphasis added]

34. Moreover, there is widespread recognition of the significance of these rights within the labour law community, as reflected in the presence of just cause clauses in an overwhelming number of collective agreements in Ontario. And indeed, there is some merit to the union's argument that the absence of a just cause clause can weaken the labour relationship by undermining the administration of the collective agreement. The clause proposed by the employer is an unusual one and no specific circumstances were cited which would differentiate this workplace from the many others where a just cause provision is standard. Applying the analysis set forth earlier, we conclude that the employer's insistence on clause 8.08(b), was without reasonable justification.

35. The employer argues that the conditions of section 40a(2)(b) have not been met because bargaining broke down, at least in part, due to the fact that the union was equally uncompromising in its insistence upon a just cause clause. We do not find this a persuasive proposition. The multi-dimensional and reciprocal nature of the bargaining process means that when negotiations break down, it will frequently be as a result of adamancy on both sides. There is no requirement in section 40a(2)(b) that the respondent's position be the *sole* cause of the failure of negotiations, a choice of syntax which recognizes the complex realities of collective bargaining. Rather, as the Board points out in general terms in *Nepean Roof Truss, supra*, the emphasis is on the existence of a causal connection between the uncompromising position taken by the respondent and the parties' lack of success in collective bargaining.

36. In addition, section 40a(2)(b) requires us to analyze the respondent's negotiating stance to see whether the conditions set out in the provision have been satisfied. There is no particular threshold test which the applicant's conduct must also meet before relief will be granted. Of course, bargaining is a dynamic process and the applicant's conduct in negotiations will form a part of the total picture from which the Board must draw its conclusions. Nevertheless, the primary focus of the Board's inquiry remains on whether bargaining has been unsuccessful because of the uncompromising nature of a bargaining position adopted by the respondent without reasonable justification. The applicant's conduct is relevant primarily to the extent that it sheds light on that central issue.

37. In this case, it is conceded that bargaining foundered on clause 8.08(b), and we have found that the respondent's insistence on that clause was both uncompromising and without reasonable justification. As a result, the requisite nexus has been established. It is not surprising that the union was so adamant upon a just cause clause, given its importance to employees and the critical role it plays in a collective bargaining relationship. We do not find the union's perseverance in this regard operates to explain or justify the respondent's position. Furthermore, while the union's strategy of concentrating on the just cause issue may have crystallized the dispute at an earlier stage of negotiations than might otherwise have been the case, on balance we find that bargaining broke down because of the substance of that dispute, and not because of the point at which the dispute emerged.

38. The employer also argued that the Board had previously "approved" the employer's position in rejecting the bad faith bargaining complaint directed towards 8.08(b), and that it would be inappropriate for the Board to now find that the position was unreasonable. We note that sec-

tion 40a expressly contemplates the possibility that its criteria may be met in the absence of bad faith bargaining by the words "irrespective of whether section 15 had been contravened". As the Board pointed out in *Nepean Roof Truss, supra*, in the passage referred to earlier, the legislation has set out a different standard for section 40a. Circumstances which fall short of the relatively restrictive standard of bad faith bargaining may still trigger the application of section 40a.

39. We note particularly that the provisions of 40a(2)(b) are not necessarily predicated on any egregious conduct on the part of an employer. There is no requirement of bad faith or anti-union animus (although these factors may be relevant) and a direction to settle a first contract by arbitration is not a penalty visited upon an employer. Rather, section 40a as a whole represents the identification of a series of situations in which the Legislature has determined that a malfunctioning labour relationship requires a special mechanism to repair or strengthen it. Indeed, it may well be that some of the provisions of section 40a will apply even where the respondent's conduct stems from ignorance, inexperience or ineptitude. Thus a finding that the conditions of section 40a(2)(b) have been met does not necessarily carry with it the same stigma that might attach to a finding that a party has violated the Act, and is not inconsistent with the Board's dismissal of the section 15 complaint in the circumstances of this case.

40. We conclude that the process of bargaining has been unsuccessful because of the uncompromising nature of a bargaining position adopted by the respondent without reasonable justification.

41. The employer also argued that, in any event, the union had abandoned its bargaining rights and was therefore not entitled to a remedy under section 40a. We do not find support for this proposition in the evidence before us. While there were indeed periods of time during which the union did little, it is not clear that anything in particular could have or should have been done. When it became apparent that the strike was unsuccessful, the union brought a bad faith bargaining complaint. It is evident that both parties found it difficult to take any steps until the decision in that matter was issued, precisely because the clause in question played such a pivotal role in their difficulties. After the bad faith bargaining decision was issued, there was a gap of some five months before this application was brought. While we agree that the union's conduct was lethargic, it is apparent that it was stymied by the events in this matter, and that it was at the same time in the throes of the merger described below. In these circumstances, we cannot conclude that the union abandoned its bargaining rights.

42. The employer suggests that the union should have called for further negotiating sessions during the period in question. Again, we do not find this a compelling argument. By the end of August, there had been three meetings dominated by the discussion of this clause in which no progress had been made. We are drawn to the reasoning of the Board in *Nepean Roof Truss, supra*, in these circumstances:

25. Finally, the company argues that the union has made no serious attempt to reopen bargaining since October or November of 1985. It is difficult to see what further efforts the union could have made in the circumstances. Having been categorically informed by the company that it would not recede either from the 3 year term or the merit clause, both of which were understandably unacceptable, and the union having compromised on almost all other major matters, it is not surprising that it determined that further negotiations would be futile without a finding by the Board that the company had bargained in bad faith and should return to the bargaining table. It is now almost two years since the union was certified, and during that time, the union has made reasonable efforts to conclude an agreement. This does not suggest that a union is absolved from the duty to continue bargaining attempts whenever it has instituted proceedings before the Board under section 89, but where the bargaining realities make such attempts obviously meaningless, it ought not to be penalized for invoking the Board's jurisdiction in this way or for recognizing the futility of the exercise.

43. The employer argued as well that the union had made no effort to contact employees in the plant for long stretches of time. While we venture no opinion on the wisdom of the union's lack of activity, we would not be surprised to find that the relationship between the union and employees was somewhat awkward, given that most of the employees presently working in the plant were hired during the strike to cross the union's picket lines. This does not in itself suggest to us either that the union had abandoned its bargaining rights or that an application which otherwise meets the requirements of section 40a should not be granted. The fact that employees presently in the bargaining unit did not originally choose the union is of little assistance, since this may well be the case in almost any mature bargaining relationship where there is a turnover of employees. In this situation, where the turnover was occasioned by the hiring of replacements during a strike, we find this argument even less persuasive.

44. Finally, the employer argued that the applicant was not the party holding bargaining rights for the employees in question, and thus had no status to bring this application. The certificate for this bargaining unit was issued to the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (hereinafter called the "BFCSD"). The Board heard evidence that a merger occurred in March of 1986 between this union and the applicant, the United Food and Commercial Workers (hereinafter called the "UFCW") and the applicant alleged that as a result, it had acquired the rights, privileges and duties of the BFCSD within the meaning of section 62 of the *Labour Relations Act*.

45. In support of its claim, the union led evidence through Walter Lumsden with respect to the circumstances of the merger. Mr. Lumsden was previously the secretary-treasurer of the BFCSD and is now an assistant to the Canadian director of the UFCW. He told the Board that the subject of a merger was raised by the general executive board of the BFCSD at a national convention in Halifax in 1984, at which time the membership delegates instructed the general executive board to study the matter and bring forward its recommendations to a subsequent convention. The general executive board investigated and researched a number of proposals from different unions and at the end of their labours, voted unanimously to call a special convention for the purpose of considering its recommendation to merge with the UFCW. A convention call was sent out to locals accompanied by three resolutions prepared by the general executive board which were oriented towards a merger with the UFCW. The first resolution provided for certain contingencies with respect to locals in the event of a merger. The second resolution amended the constitution to eliminate obstacles to a merger, and approved such a merger in general terms. It should be noted that even prior to the adoption of the second resolution, the constitution expressly contemplated the possibility of a merger. The third resolution provided for a merger specifically with the UFCW.

46. Subsequent to the issuance of the convention call, each local held a membership meeting at which the three resolutions were discussed and a draft merger agreement with UFCW was circulated. In total, three notices were sent to locals with respect to the convention: a warning of the coming of the convention call, the convention call, and a reminder. Duly accredited delegates from each local then attended the special convention on January 17th, where the draft merger document was again circulated. The three resolutions effecting approval of the merger with the UFCW were passed by the requisite majority and the merger agreement was then signed by the authorized officers of both unions.

47. The UFCW notified the BFCSD that it had formally recognized the merger on March 3, 1986, and all affected members of the BFCSD became members of the UFCW. In addition, BFCSD affected locals were issued new charters from the UFCW and the staff of the BFCSD were absorbed into the staff of the UFCW.

48. Mr. Lumsden's evidence was comprehensive and it was subjected to a thorough and vigorous cross-examination. On the material before us, we are satisfied that the merger took place properly and in accordance with the BFCSD's constitution.

49. However, the employer argued that even if we found that the merger had properly taken place, we should decline to find successor status in the UFCW with respect to this local. The rationale for this argument was directed at the involvement of the local in the merger process and the disaffiliation options available to it. We find these comments of little assistance since the certificate was issued to the national union and it is the applicant international with which the former merged which claims successor rights in the course of this application. Moreover, we note that the BFCSD local of which this bargaining unit formed a part did hold a membership meeting to discuss the resolutions and the draft merger agreement, attended the special convention in question, and voted in favour of the merger. There was no evidence that the local disaffiliated, or took any steps which might bring other considerations into play.

50. We therefore declare that pursuant to section 62 of the *Labour Relations Act*, the applicant UFCW has acquired the rights, privileges and duties of its predecessor the BFCSD by reason of a merger. As a result, we declare that the applicant succeeded to the bargaining rights for this bargaining unit originally granted to the BFCSD, and has standing to bring this application. We note in passing that the successor rights issue appears to have played no role in the breakdown of negotiations.

51. In light of our decision with respect to section 40a(2)(b), we do not find it necessary to address the applicant's claims with respect to section 40a(2)(a) and section 40a(2)(c). Neither do we find it necessary to determine the factual dispute with respect to whether the employer's letter was sent directly to employees or delivered to the union for presentation to employees, since this allegation is related to the applicant's arguments with respect to section 40a(2)(a).

52. We therefore direct the settlement of the parties' first collective agreement by arbitration.

DECISION OF BOARD MEMBER R. M. SLOAN;

1. My colleagues and I agree upon the basic facts in this case. The area of disagreement involves the interpretation of those facts insofar as they support the union's application for a direction under section 40a(1).

2. Section 40a(2)(b) deals with "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification". This section does not appear to recognize that the reason behind the unsuccessful negotiations may well be a bargaining position adopted by the *applicant*.

3. The issue, as I see it, is not the *content* of the company's proposal, but the *process* of negotiations which was brought to a halt by the ultimatum issued to the respondent by the applicant, at only the second meeting, requiring that subsection (b) of the subject discharge clause (see paragraph 6 of the majority decision) be withdrawn before the union would enter into any further negotiations.

4. It is not necessary for present purposes to comment on the nature of any proposal advanced by either party other than to state that difficult issues are part and parcel of the negotiation process. However, each party has to be willing to at least consider the other party's position

and make some effort at compromise. Such was not the case here. The applicant, having decided that the respondent's proposal was unacceptable, effectively terminated the *process*.

5. The applicant frankly admitted that it failed in its strategy to force the respondent to withdraw its discharge clause. This strategy included the ultimatum, the strike vote, the strike itself, and the section 15 complaint. Having thus failed to achieve its goals by applying pressure upon the respondent, the applicant sought the imposition of a collective agreement through the arbitration procedures of section 40a. Is the Board to direct first contract arbitration whenever an applicant finds a respondent's proposal unacceptable and therefore refuses to enter into, or to continue, negotiations? It is my contention that this would be the wrong message to send to parties engaged in first collective agreement negotiations.

6. In this instant case - a) the parties had, in only two meetings, successfully negotiated articles 1 through 13 (except for 8.08 (a) and (b)); b) evidence at the hearing confirmed that the respondent had proposed maintaining the current wage and benefit levels and that the applicant would find this acceptable if section 8.08 (b) was withdrawn; and c) there was optimism that articles 14 to 27, inclusive could be settled without difficulty if an acceptable discharge clause could be negotiated, and the evidence indicated a willingness on the part of the respondent to negotiate on this contentious issue. In view of the foregoing, there is reason for optimism that further direct negotiations would result in an early resolution of the dispute.

7. For the reasons expressed in the aforementioned paragraph, I would have dismissed the application.

2598-86-U; 2785-86-U Glen Cullen, Complainant v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Local 414, Respondent v. **The Great Atlantic & Pacific Company of Canada, Limited**, Intervener; Glen Cullen, Complainant v. Mr. Peter Cleary, Mr. Beaton, and the Great Atlantic and Pacific Tea Company of Canada, Respondents v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Local 414, Intervener

Health and Safety - Complainant fired for refusing to clean washroom - Complainant reinstated pursuant to settlement with seniority but without compensation - Two months after reinstatement complainant filing complaint under OHSA in order to recover lost earnings - Complaint dismissed - Complainant had agreed to a resolution of his grievance in another forum - Board exercising discretion not to inquire into complaint

BEFORE: Ken Petryshen, Vice-Chair, and Board Members D. G. Wozniak and R. R. Montague.

APPEARANCES: Glen Cullen for the applicant; Frank Reilly, Frank Richards, Roland Pearce and Carl Anthony for the respondent; Charles R. Robertson and Dana M. Stevens for the intervener.

DECISION OF THE BOARD; May 28, 1987

1. The Board has two matters before it. Board File No. 2598-86-U, which was filed with the Board on December 11, 1986, is a section 89 complaint alleging that the Retail, Wholesale and

Department Store Union, Local 414 (the "union") contravened section 68 of the *Labour Relations Act*. Board File No. 2785-86-OH, which was filed with the Board on January 6, 1987, is a complaint under the *Occupational Health and Safety Act* (O.H.S.A.) alleging that the respondents contravened section 24(1) of that Act. On agreement of the parties, these complaints are hereby consolidated. We will first address Mr. Cullen's complaint under the O.H.S.A.

2. Given the manner in which we have disposed of this complaint, we do not find it necessary to set out the events of August 8 in detail. For our purposes, the material facts relating to the O.H.S.A. complaint can be summarized as follows.

3. Although not scheduled to work on August 8, Cullen, a part-time employee, was called in to work at approximately 9:00 a.m. by P. Cleary, store manager. When Cullen reported for work at approximately 10:00 a.m., Cleary assigned him a number of duties, one of which was to clean the employee washroom in the basement at the back of the store. Later in the morning, Cullen advised Cleary that he would not clean the washroom since the smell in the washroom would make him sick. On a number of occasions, Cleary directed Cullen to clean the washroom. Cullen continued to refuse. Cullen was given the opportunity to meet with two stewards who advised him to comply with Cleary's direction. Since Cullen still refused to clean the washroom, Cleary terminated his employment. D. Downer, a full-time employee, subsequently was directed to clean the washroom. In his evidence, Downer indicated he cleaned the washroom in approximately ten minutes and that the smell did not bother him.

4. Shortly after August 8, a grievance was filed against the Great Atlantic & Pacific Company of Canada Limited (the "employer") challenging Cullen's discharge. A second stage meeting concerning the grievance occurred on September 10, 1986. Since the employer was not prepared to alter the discharge, the union gave the employer notice by letter dated September 22, 1986 of its intention to arbitrate Cullen's discharge grievance. Near the end of October, 1986, the employer initiated settlement discussions with F. Richards, the union's business agent. The employer offered to reinstate Cullen with seniority but without any compensation. When he relayed the employer's offer to Cullen, Richards explained to Cullen that there was no guarantee his grievance would succeed at arbitration and that his grievance might not be heard for some time. In this discussion, Richards emphasized that it was up to Cullen to decide whether he would accept the employer's offer. Since Cullen appeared to be a little uncertain, Richards suggested he take some time to think it over. On the following day, Cullen called the union and indicated that he had decided to accept the employer's offer. Cullen was reinstated effective November 3, with seniority but without any compensation, pursuant to the settlement of the grievance between the union and the employer. Approximately two months after his reinstatement, Cullen filed this complaint under the O.H.S.A. in order to recover his lost earnings from the time of his discharge until his reinstatement.

5. One of the submissions made by counsel for the employer was to the effect that the Board should exercise its discretion in favour of not inquiring into the complaint, since the dispute over Cullen's discharge was settled between the parties during the grievance procedure with Cullen's consent. Given the Board's conclusion on this issue, it is unnecessary to address the other submissions of the parties.

6. Section 24(1), (2) and (3) of the O.H.S.A. read:

24.-(1) No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

7. When a worker feels that he or she has been affected by a contravention under section 24(1) of the O.H.S.A., subsection (2) requires the worker at some point to make an election of the forum in which he or she will seek a remedy. At some point, a worker must choose either to proceed before the Board or to proceed under the arbitration provisions of the relevant collective agreement. See, *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283, and the cases cited therein. It is not necessary for us to define with precision at what point the worker must make an election. But having elected one forum and having obtained a determination of the issue in that forum, a worker cannot then attempt to obtain a remedy in the other forum. Implicit in section 24(2) and the choice of procedures set out therein is the recognition of the undesirability of having the same issue litigated in two quite separate forums. We agree with the comments of the Board in *The Municipality of Metropolitan Toronto*, *supra*, at paragraph 10, where the Board stated that the O.H.S.A. issue raised by a grievance is not severable in the sense that one can take the just cause aspect of a discharge to arbitration and the O.H.S.A. aspect to the Board. The issue of whether the discipline was proper is one issue and with respect to that issue a worker must at some point choose in which of the two forums he or she will seek a remedy.

8. In the circumstances before us, Cullen elected to seek a remedy for his discharge by utilizing the grievance and arbitration provisions of the collective agreement between the union and the employer. Cullen's discharge grievance was settled by the union and employer with Cullen's consent. Not only did Cullen seek a remedy under the collective agreement, but a resolution of the discharge grievance was achieved which was acceptable to Cullen. In filing his O.H.S.A. complaint approximately two months after his discharge grievance was settled, Cullen is, in effect, attempting to raise the same issue, namely the propriety of his discharge, before this Board, after agreeing to a resolution of the discharge within the process of the other available forum. The Board finds that this is an appropriate situation in which to exercise its discretion in favour of not inquiring into Cullen's complaint in Board File No. 2785-86-OH.

9. Accordingly, Cullen's complaint in Board File No. 2785-86-OH is hereby dismissed.

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[Remainder of decision omitted: Editor]

3126-85-R; 0135-86-U United Food and Commercial Workers International Union Local 175, Applicant v. **Hayloft Steakhouse Limited**, Respondent v. Group of Employees, Objectors; United Food and Commercial Workers International Union, Local 175, Complainant v. Hayloft Steakhouse Limited, Respondent

Certification - Interference in Trade Unions - Intimidation and Coercion - Petition - Unfair Labour Practice - Three employees called individually into management's office and questioned about union organizing drive - Board concluding most employees would have become aware of interviews and their contents - Bonus cheques given to employees - Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union - Exertion of pressure and undue influence breach of Act - Petition not voluntary - Union certified and posting ordered

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *J. J. Nyman* and *M. McKay* for the applicant/complainant; *B. H. Stewart*, *Bill Simpson*, *John Degroote* and *Carolyn Kay Aggio* for the respondent; *David Sepejak* for the objectors.

DECISION OF ROBERT J. HERMAN, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; May 7, 1987

1. These consolidated proceedings consist of an application for certification and a complaint filed pursuant to section 89 of the *Labour Relations Act*, alleging that the respondent has violated sections 64, 66, 70, 79, and 80 of the Act. It was evident from the evidence and submissions in these proceedings that the complainant was not pursuing its allegations with respect to sections 79 and 80 of the Act, and the Board dismisses the complaint in that regard.

2. In a prior decision in this proceeding, the Board noted the partial agreement of the parties that the bargaining unit should be described in terms of "all employees of the respondent in the Municipality of Metropolitan Toronto", subject to certain exclusions over which the parties remained in dispute. In that prior decision, dated April 16, 1986, the Board declined to appoint a Board Officer to inquire into the disputed exclusions; however, in light of our decision set out below we hereby appoint a Board Officer to inquire into and report back to the Board with respect to the issues raised by the parties over the individuals in question set out in that decision.

3. The respondent owns and operates several restaurants in Ottawa, and one restaurant in Toronto, the restaurant subject of these proceedings. During 1985, the respondent embarked upon a renovation programme with respect to all of its restaurants, involving both structural changes to the respective premises and changes in concept. In November and December of 1985, the respondent was primarily concerned with renovations in the two Ottawa restaurants, and when those were finished around Christmas of 1985, concentrated its efforts on the Toronto restaurant reconstruction. The Toronto renovations were substantial, and included at various times removing parts of the ceiling, changing walls, completely relocating the washrooms in the premises, and the moving of the heating equipment for the entire restaurant. With respect to the latter renovation, the disconnecting and moving of the heating units of the restaurant, although problems with heating occurred during the renovation phase as early as Christmas of 1985, the heating units themselves were disconnected and moved around February 3, 1986 thus commencing the major phase of renovation and resulting in the major phase of disruption, inconvenience, and imposition to the staff and customers of the Toronto Hayloft Restaurant.

4. Before recounting the chronology of events, we introduce some of the main characters. Bill Simpson is General Manager of all Hayloft operations, including all the restaurants, and all aspects of running and managing those restaurants. Until late February or March of 1986, Simpson ran these operations from an Ottawa headquarters, with the assistance of his second-in-charge, John Payne. Some time during those months, in order to supervise reconstruction of the Toronto restaurant, Simpson moved his base of operations to Toronto. Although Simpson is General Manager of all operations, each restaurant has its own on-site Manager, and for the Toronto restaurant at all relevant times that was John Degroote. John Degroote has a brother, Peter Degroote, who was a bargaining unit employee in the Toronto restaurant which John managed. Similarly, Simpson's assistant John Payne has a brother Peter Payne, who was also an employee in the relevant bargaining unit.

5. On February 1, 1986, John Degroote, (Manager of the Toronto restaurant) convened a meeting at the restaurant in order to discuss with employees various new policies which he intended to implement, and enforce, with respect to his restaurant. The meeting was run by John Degroote with the assistance of Karen O'Brien and Henry Silva. These individuals are challenged by the union as exercising managerial functions, for purposes of the certification application, but the respondent maintains they do not so exercise such functions. All the employee witnesses before the Board testified that O'Brien and Silva were their managerial supervisors. At the meeting, employees were handed a typed summary of the new policies. As John Degroote testified, he wanted to ensure that each employee knew these were the policies and that they understood Degroote would ensure that everyone followed them. He further testified he did enforce them subsequent to February 1st. As quoted from the typed summary that all employees received, one of the new policies to be implemented reads as follows:

NO STAFF MEMBER WILL BE PERMITTED TO DRINK AT THE BAR. NO ALCOHOLIC BEVERAGES WILL BE CONSUMED WHILE A STAFF MEMBER IS IN UNIFORM. The only time a staff member may consume alcohol on the premises is if you are punched out, out of uniform and sitting at the tables by the windows in front of the Tannery. This applies to everybody, pit drafts and cash out beer etc. Any staff member who wishes to eat, read etc. between shifts may do so in the Tannery but only at the front tables.

This meeting, along with the subsequent meetings to which we will refer, were considered mandatory by management; employees were expected to attend, whether or not they were on shift at the time, and all employees were compensated for their attendance. In these circumstances, we conclude that all employees were aware of these policies, including the policy quoted above, and were further aware that management would enforce such policies. We also find that John Degroote did enforce these policies in the Toronto restaurant.

6. The next meeting held by management occurred on February 25, 1986, and was chaired by Simpson, who had travelled from the Ottawa office in order to do so. Staff was again expected to attend and were compensated for so doing. Simpson outlined and discussed the renovation plans, their purpose and progress, the projected phases of such renovations, and discussed with employees the proposed change in "concept" of the restaurant. Various other matters were discussed, two of which are worth noting. Simpson discussed new uniforms to go along with the new concept and the new look, and he discussed projected trips to Ottawa for all staff, in order to have Toronto employees see the completed Ottawa restaurant, along with its own new concept. Although the details and timetabling of such trips were to be finalized subsequent to the meeting on February 25, the trips were discussed. Shortly thereafter, lists were posted for employees to sign, indicating on which day they wished to take the Ottawa trip. In its complaint, the complainant suggested that the timing of the announcement by management indicating it would pay for the new uniforms, and of the Ottawa trips, provided support for its unfair labour practice allegations,

as the announcements were geared to undercut union support by providing incentives to employees. However, it was clear from the evidence that both these matters were raised and discussed at the meetings on February 25, 1986, before management was aware of any union organizing drive, and in any event, the applicant did not seriously pursue these matters in its final submissions.

7. Also at the meeting (on February 25) Simpson advised all staff he would be in Toronto considerably more frequently and more often from that time forth, as the Ottawa renovations were substantially completed and he wanted to oversee the Toronto construction. Simpson also introduced his assistant, John Payne, as the Director of Operations for the restaurants, and advised that John Payne would be working with Simpson in Toronto from that time forward. Finally, Simpson opened the meeting to comments or complaints from employees, and received numerous complaints from the floor, expressing concern over the effect of the renovations, the inconvenience and discomfort occasioned by the renovations, and more particularly, the effect that those renovations would have on the earnings of the staff. Employees were concerned that the renovations would cause fewer customers to eat at the restaurant, or alternatively, would shut down certain parts of the restaurant, in either event reducing the tips staff could expect. Simpson responded in an apologetic and sympathetic fashion, but did not indicate any specific action would be taken to satisfy any of the employees' complaints.

8. Shortly after this meeting, around the first week of March of 1986, employees at the restaurant began to talk about the possibility of unionization, though nothing concrete was discussed and no particular union was then seeking to organize the employees. Such talk continued over the next week or so, again without any specific action being taken. On March 12, 1986, Simpson met in Ottawa with the owner of the respondent, Saul Shabinsky, as he did every Wednesday, in order to discuss business and various aspects and decisions being made thereto. Although Simpson had independent authority with respect to all aspects of the business and did in fact exercise such independent decision-making, regular Wednesday meetings were held with Shabinsky in order to discuss whatever aspects of the business were then pertinent. At the meeting on March 12, Simpson discussed with Shabinsky whether employees in the Toronto restaurant should be compensated for their lost income, due to the renovations and the consequent reduction in tips that they would receive. Simpson proposed to Shabinsky that employees be compensated, with the employees of the bar (the Tannery area) to be compensated for the anticipated losses when the bar closed as expected on March 24, and with all other employees to be compensated at the same time for the losses they had already incurred during February and that portion of March to date. Shabinsky apparently concurred with Simpson's proposal in this regard, and Simpson shortly thereafter discussed the compensation with his assistant, John Payne. A firm decision was then made that Toronto employees would be compensated as per the proposal to Shabinsky. No one in the Toronto restaurant, not even manager Degroote, was advised of the decision to compensate employees, nor when such compensation would be announced or paid to employees, until a meeting with employees, chaired by Simpson, on March 20th, when the compensation was first announced. We will return to the meeting of March 20.

9. On Friday March 14, 1986, shortly after Simpson had decided to compensate all the employees, but before anyone in Toronto was so advised, John Degroote phoned Simpson from the Toronto restaurant, to advise Simpson that Degroote had just been advised by an employee that a union was organizing in the restaurant and was seeking to be certified for the employees. Simpson advised John Degroote to exercise caution, as the employees had certain rights, and told Degroote that he should not do anything, other than gathering his management staff together, and he ought not to say anything to any employee about the union organizing drive.

10. The following Monday, March 17, according to the previously organized schedule, the

first trip to Ottawa of a group of Toronto employees occurred, led by John Degroote. Degroote went with the employees, by van, to Ottawa, and stayed with them in the Ottawa restaurant for a short time. Although he spoke to Simpson and John Payne during the Ottawa visit, Degroote testified they did not discuss the phone call from the previous Friday nor any matter involving the union drive in Toronto. Because of a personal problem requiring John Degroote to return to Toronto, he flew back to Toronto on the afternoon of March 17, rather than returning by van with the other employees. In Toronto, Degroote had to return to the restaurant, since his car was parked there, and he arrived at the restaurant around 6:00 p.m. on the evening of March 17, during the supper hour. Degroote testified that he had taken the union drive rather personally, since he felt that the employees' desire to be represented by a union was in some large respect tied to some misconduct on his part, or at least that he had not kept the employees under him content. As he testified, "Perhaps I was too stern with respect to the policies and how I had directed" the work place. Upon entering the restaurant, John Degroote asked to see three employees, in sequence and individually, in his office. Degroote indicated he picked the specific three employees he asked to see because he felt he was closer to those employees, had a communication link with them, and could better find out what was going on from them as they would be more inclined to trust him and in turn he to trust them.

11. The first employee he requested come to his office was Suzanne Vollbregt, a dining room waitress. In full view of all the employees then present, John Degroote walked into the restaurant, stopped Vollbregt during her shift while she was serving tables, and asked that she come to his office forthwith. Vollbregt proceeded as directed into Degroote's office, and Degroote then questioned her about any rumours she might have heard. Specifically, he advised her that he knew a union was being formed, he named (accurately) the three union organizers in the restaurant, and he further indicated that he knew Vollbregt had signed a union card. Degroote also told Vollbregt that he had come directly from Ottawa, where he had been told to clean up "the mess by the end of the week or he would lose his job." Vollbregt and Degroote were casual friends, and she was accustomed to speaking to him, as a friend, at the restaurant. She testified that she felt Degroote probably would not have spoken to her that day if he had not felt on a friendly basis with her. Whatever the reason for Degroote's choosing Vollbregt to question, the tenor of the conversation was not friendly. She testified she felt threatened by the interview and its content. Degroote knew she had signed, people were losing their jobs for no reason (2 part time employees had recently been discharged, and for no reason apparent to the employees), and in that context Degroote had brought her into her office in full view of everyone, during the evening dinner hour and while she was on shift. Although there were some discrepancies in the evidence given by Vollbregt and John Degroote with respect to their conversation, we prefer the evidence given by Vollbregt wherever a conflict exists. Degroote himself testified that the main purpose of the meeting was to find out whether the union rumours were true, and to hear Vollbregt's side of the story. He conceded they had discussed the union during this meeting. Vollbregt subsequently discussed this interview with 2 fellow employees.

12. After finishing his conversation with Vollbregt, and releasing her to return to her tables, Degroote emerged from his office and called another employee, Bob Desrosiers, into his office, again while that employee was in the midst of his shift and serving customers, and again in front of the other employees then present. Degroote's conversation with Desrosiers in part followed the same lines as his conversation with Vollbregt, enquiring whether the rumours about the union were true and attempting to discover the current state of the discontent or organizing at the restaurant.

13. When that conversation was over, Degroote returned to the restaurant and summonsed Michael Dicks, a pit cook, into his office. Degroote's questioning of Dicks was again similar in

nature to his questioning of the two prior employees, as he enquired about the union and whether the rumours were true. We conclude that most, if not all, employees in the bargaining unit would have become aware of these interviews and their content. Vollbregt discussed her interview with 2 fellow employees, and all employees on shift at the time would have seen Degroote, agitated and emotional, take 3 fellow employees from their work stations into his office. In the context of restaurant employees and the close confines in which they work and socialize, we have no hesitation in inferring that employees would have discussed these events. Indicative of the fact that the news of the events had spread, one of the organizers, as identified by Degroote to Vollbregt, phoned her the next day to ask about her meeting with Degroote. These interviews or interrogations were apparently in direct contravention of Simpson's instructions to Degroote, to do nothing and to not speak to employees, collectively or individually, about the union. Degroote reported these meetings to Simpson the following week. Simpson at no time took any steps to correct the effect of Degroote's behaviour nor the impression it would necessarily have left on other employees. During this period, employees were discussing (they thought secretly) the possibility of joining a union, although no application had as yet been filed.

14. On March 20, 1986 another meeting was convened of all employees, chaired by Simpson, and again all employees were expected to attend and were compensated for doing so. Although Simpson had been made graphically aware of employee complaints, certainly by the meeting of February 25 at which he had solicited comments from the employees, no concrete responses or changes had been made up to the meeting of March 20, 1986, and as we noted above, although Simpson had decided to compensate employees for their financial losses on or about March 12 no announcement or indication of this decision had been made prior to the meeting of March 20. By that meeting, Simpson and all of management were well aware that the union organizing campaign was going on, as John Degroote had phoned Simpson on March 14 to so advise him. At the March 20 meeting, Simpson reviewed many of the items he had discussed at the February 25 meeting, including the new uniforms, the phases and progress of the construction, and he further indicated, for the first time, that all employees were to be compensated for their already incurred or projected losses resulting from the renovations. This compensation was to consist of a lump sum payment, varying with the type of employee involved (i.e. whether part-time or full-time) and Simpson advised employees that over the next week or so individual meetings would be held for them to be given their bonus cheques. The substance of this meeting, including the payment of bonus cheques for compensation for the renovation losses, was reflected in a typed sheet posted shortly after the meeting and handed out to all those employees present at the meeting.

15. In his evidence, Simpson explained the need to meet with each employee individually in order to give them their bonus cheques, on the basis that his bookkeeper had advised him that the ordinary payment method, of direct deposit to the employees' bank accounts, was unsuitable for payment of these varying amounts of bonuses. He further testified that while his bookkeeper felt individual cheques were necessary, Simpson himself felt that the individual meetings were necessary in order to present those cheques, not to discuss the compensation but because management wanted to establish rapport with each employee, and meeting with them individually was the appropriate way to accomplish this. No cheques were actually handed out to employees at that meeting on March 20. There was no evidence as to when Simpson made the decision to distribute the bonus cheques through meetings with individual employees.

16. On March 26, the Company received official notification of the union's application for certification, and notices were posted in the work place advising employees of the application, and advising them of their right to object to the union being certified and further advising them how they could exercise such objection if they so desired.

17. During March 26 or 27, Simpson and John Payne met individually with various employees, in order to give them the bonus cheques referred to above. Simpson met with approximately three employees during this period and Payne met with approximately five or six employees. Simpson testified that when he met with each employee and gave him or her the cheque, they discussed problems in the work place but not the union. One employee, Michael Dicks, testified that he met with John Payne in order to receive his cheque, and that Payne had told him he knew what was going on about the union and that they had discussed the union. Dicks was called as a witness by the petitioner, and testified toward the beginning of these proceedings. John Payne was not called and did not give evidence in these proceedings.

18. All of these events and interviews occurred prior to the origination of the petition filed in these proceedings opposing the certification of the union. The petitioner, David Sepejak, was a bartender in the Tannery in the respondent's Toronto restaurant throughout the relevant period, and he represented himself in these proceedings before the Board. As will be seen, we have concluded that the petition does not represent a voluntary expression of the wishes of those employees signing it, and accordingly, the Board will give no weight to that petition. However, we note the intelligent, capable, and reasonable fashion in which Mr. Sepejak conducted himself throughout these proceedings.

19. On March 27, Sepejak decided to draw up a petition, obtain employee signatures and oppose the union. Sepejak had been advised by another employee that the Notice of Application of Certification (the Board's form advising employees of the union's application) had been posted in the work place on March 26 and he subsequently read the posted notice. During the week or so prior to March 27 Sepejak had decided that he was going to oppose the union, but it was only by reading the posted notice that he understood in concrete terms how to formulate such a response. On the 27th of March, Sepejak advised his manager, Henry Silva, that he had an appointment, without disclosing the reason for the appointment, and got another employee to cover his shift at the bar. It was not unusual for bartenders to trade off shifts with each other, without prior approval from management, provided the bar was properly attended at all times. Sepejak attended at the Ministry of Labour, where he obtained brochures or pamphlets describing the certification process. From prior discussions with Peter Degroote, the brother of restaurant manager John, Sepejak had learned that Peter Degroote was firmly opposed to the union. The two of them arranged to meet that night, after work, outside the restaurant, in order to discuss potential opposition to the union.

20. Later that evening, at approximately 7:00 p.m., Peter Degroote and Sepejak met at a restaurant in the same neighbourhood, where Peter Degroote advised Sepejak who was for and who was against the union, matters Peter had gleaned through discussions with other employees. It was agreed that because of his familial relationship with the manager, Peter Degroote would not be involved in obtaining the signatures and that he would not be further involved in the circulation of the petition. After that meeting between the two of them, both attended a further meeting at the house where Sepejak was then staying, where various employees discussed their opposition to the union. Despite Peter Degroote's explicit denial during his evidence, we conclude that Peter Degroote did continue to be involved in the petition, by discussing with Sepejak as time went on, which other employees might be opposed to the union and be willing to sign the petition, and further, in trying to discuss with his brother what was happening with respect to the union. Both Sepejak and Peter Degroote's brother John testified to Peter Degroote's further such involvement.

21. Sepejak began collecting signatures on the petition on March 29, and continued through the following days, obtaining the last (23rd) signature on April 4, 1986. Sepejak was not scheduled to work and did not work, *inter alia*, on March 28, 31 and April 1, 2, and 3. Nevertheless, through-

out periods of those days, though unusual for Sepejak to do so, he was present in the restaurant and, while there arranged to have various employees sign the petition. Sepejak was in and out of the restaurant and bar area (the Tannery) during the course of those days, sitting on occasion at the bar, though off duty. On at least one of those days (March 31), he was at the bar talking to his girlfriend for approximately four hours, off and on, during which various managers saw Sepejak, as did fellow employees. Notwithstanding the clearly stated policy (as quoted above in ¶15) that "any staff member who wishes to eat, read etc. between shifts may do so in the Tannery but only at the front tables", and notwithstanding the unchallenged evidence of manager Degroote that he strictly enforced this policy subsequent to February 1, 1986, no management member in any way approached Sepejak to indicate he was not to sit at the bar, drinking coffee, and talking to his girlfriend. When we read the policy in its entirety, we conclude that the policy prohibits employees from sitting at the bar when they are not working, whether or not they are drinking alcohol. We draw the inference that employees, all aware of this policy and its strict enforcement, would have thought management was in effect bending the rules to allow Sepejak to sit at the Tannery bar. Indeed, Sepejak himself testified that numerous employees approached him to ask what he was doing and why he was sitting at the bar throughout this period. He also testified that employees knew he was circulating a petition.

22. Sepejak testified that his immediate manager, Henry Silva, had been aware of the union organizing long before the Notice of Application had been posted on March 26, and in fact had told Sepejak he was aware of the union cards being signed and that he (Silva) had in fact seen them. Sepejak testified this conversation occurred prior to his decision to oppose the union and circulate a petition. Henry Silva was not called by the respondent to give evidence in these proceedings.

23. It was during the period that Sepejak was obtaining the signatures on the petition, that Simpson and John Payne were meeting with numerous individual employees, giving them bonus cheques for compensation for incurred or anticipated losses, and Payne, at least, was discussing the union with those individual employees. Simpson testified that those meetings stopped because legal counsel advised him not to hold them.

24. With these facts in mind, we turn to the submissions of the parties. The union submits that the petition is not voluntary, given the individual meetings management held with three employees on March 17, meetings which were specifically tied to the union organizing drive, and given the meetings with individual employees, where gratuitous bonus cheques were delivered and the union discussed. It is only after these events that the petition originated. With respect to the complaints alleging breaches of sections 64, 66 and 70 of the *Labour Relations Act*, the union submits that the same two series of interviews contravened the Act, as those conversations and the content of the conversations were clearly designed to exert undue influence and have a coercive effect on the individual employees, and by inference all employees in the potential bargaining unit.

25. In response, the respondent suggests that there is nothing before the Board which indicates that the petition was other than a voluntary expression of the employees' wishes. The fact situations leading to a union organizing in a work place are also often the situations leading management to take corrective action and to respond to employees' concerns. In counsel's submission, this happened in the instant case, as management became aware of the problems being experienced by employees, and properly and promptly took corrective action to retain a happy work force. The payment of the bonus cheques, and the meetings with employees during which those cheques were handed over, were proper responses to employee discontent and an attempt by management to create a better working relationship with the employees. No part of the purpose of those meetings was an intention to interfere with the union or to exert undue influence on the individual employ-

ees. With respect to the individual meetings held by John Degroote on March 17, counsel sought to distinguish those meetings from similar situations canvassed in prior Board cases, on the grounds that Degroote was careful not to ask the individual employees whether or not they had signed union cards or whether they were union supporters. Further, Degroote did nothing subsequent to those meetings with respect to what he had heard from the employees. Counsel submitted that it was clear that Degroote's conversation with Vollbregt did not have any effect on her as she remained unafraid after that meeting and testified that she was not worried about any specific repercussions. Finally, counsel submitted we ought not to draw any adverse inference from Simpson being advised by legal counsel to terminate the individual meetings, during which the bonus cheques were paid, as those meetings had been planned properly in connection with the problems experienced in the work place and there was nothing improper in holding them.

The Decision

26. There are two issues which the Board must decide. First, whether the petition represents a voluntary expression of the wishes of the employees who signed it, and second, whether the Company has breached any or all of sections 64, 66, and 70 of the Act. We propose to deal with those two issues in sequence. Before we turn to the evidence with respect to the voluntariness of the petition, we can usefully refer to two prior cases of the Board. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of its enquiry with respect to whether a petition is a voluntary expression of the employees who signed it as follows:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interameri-*

can Corporation, [1982] OLRB Rep. Oct. 1387, wherein the Board more recently reaffirmed its approach to such employee statements:

40. ... Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involves petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity of interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasions joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

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41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

27. We return now to the evidence. Three employees were individually called into John Degroote's office, despite their being on shift and working at the time, and were summonsed to these meetings in front of all other employees then working at the restaurant. Each of the three employees was questioned about the union presence at the restaurant and about whether the rumours about the union organizing were true. Though Degroote was specifically instructed by Simpson not to discuss the union with employees, from their perspective, they would have no way of knowing that senior management in Ottawa was opposed to the types of meetings Degroote held. With Vollbregt, Degroote identified the names of the three union organizers and indicated he was aware she had signed a card. These conversations with the three employees took place in a general context of concern about the renovations, and of concern about the recent firings of two part-time employees, for no cause apparent to the employees. Given that the three employees were taken to these meetings in front of other employees, and given that at least one employee, Vollbregt, related the circumstances of her meeting to another employee, we conclude that all of the employees would have been made aware, shortly thereafter, of management's views with respect to unionization. Confirmatory of this, as noted earlier, one of the union organizers phoned Vollbregt the next day, having heard about her meeting with Degroote. Further, since management indicated to Vollbregt that they knew she had signed, employees would likely have felt that management would be aware of which employees had signed cards and in the context of the peti-

tion, which employees had or had not signed any potential petition. In all these circumstances, most of the employees would have concluded that management was opposed to the union, had already been able to identify some employees involved with the union and could well identify others, and adverse consequences might follow because of the union campaign or the employees' involvement in it. These circumstances lead us to conclude the petition does not represent reliable evidence of the wishes of those who signed it and we do not find it to be voluntary.

28. Silva's conversation with the petitioner Sepejak, in which he indicated he had seen the union cards, also causes the Board concern. Sepejak was the person primarily responsible for the origination of the petition, and he was responsible for obtaining the signatures of the majority of the names obtained. Prior to his beginning the petition, he was told by his immediate supervisor Silva, that Silva knew who had signed union cards. We are not satisfied that Sepejak was not moved to oppose the union and to circulate a petition because of what he learned from Silva, that management was aware of the union, and of those who had signed union cards. Sepejak could well have initiated and circulated the petition out of a desire to respond to management's awareness of and concern about the union. We are not satisfied that the petition is voluntary on this basis as well.

29. Both the granting of the individual bonuses and the process during which the bonus cheques were handed out were extraordinary actions on behalf of this employer. Prior meetings with employees had taken place collectively, rather than on a one-on-one basis, and there had been no meetings with either Simpson or John Payne and individual employees prior to the meetings during which the cheques were given. When the bonus cheques were handed to employees, the union organizing campaign was discussed by a senior manager. The circumstances of and discussions during these meetings would quickly have become known by other employees. These meetings would likely have conveyed to them that management was opposed to the union, and that management was prepared to pay some money to support its opposition, and accordingly we cannot accept the voluntariness of the petition for this reason also.

30. After these three series of events, the petition originates and Sepejak begins to obtain signatures. Although most of the people signing actually signed outside the restaurant premises, arrangements for most of those signatures were made by Sepejak on the premises, during periods when Sepejak was not working. Though unusual for him to be on the premises on such days, for several days in procession, he spent large amounts of time sitting in the restaurant, talking to individual employees, and then leaving the restaurant for short periods in order to obtain signatures. During some of these lengthy periods in the restaurant, Sepejak sat at the bar, drinking coffee and talking to his girlfriend, with the full awareness of management that he was doing this, and with the knowledge of other employees that management must have been aware. Management did nothing to prevent Sepejak from sitting at the bar, despite the well known policy that employees were not to sit at the bar and drink or eat when they were off shift, and despite employees' awareness that management had been strictly enforcing this policy. Again, the likely perceptions of employees would have been that management was condoning Sepejak's behaviour in collecting signatures from within the employer's premises, and employees would have understood that management was thereby opposed to the union and prepared to allow special dispensation for employees similarly opposed. Again, at this point the bonus cheques had been distributed, Payne had discussed the union with employees, and Degroote had already held his meetings with the three employees.

31. Whether any employee would perceive that the names on the petition would come to the attention of management, given Peter Degroote's known involvement in the petition, and the fact that his brother was manager (and that they lived in the same house) is unnecessary for us to decide given our decision on the other grounds discussed above.

32. In all these circumstances and for all these reasons, we are not prepared to conclude that the petition represents a voluntary expression of the wishes of the employees signing it, and accordingly we give no weight to that petition.

33. We turn now to a consideration of the unfair labour practice complaints. The three sections alleged to have been breached by the respondent read as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under the Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

34. The Board was referred to several cases, one of which is particularly apposite. In *J. Pascal Inc.*, [1985] OLRB Rep. July 1075, in somewhat similar circumstances the Board stated as follows:

21. This is not a case where it is alleged that union supporters were discharged or penalized in any way. Rather, the union relies solely on the statements made by management officials. The Act does not require that an employer stay neutral during a union organizing campaign. To the contrary, section 64 expressly states that nothing in the section 'shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, threats, promises or undue influence'. Where the difficulty arises is in trying to draw the line at which an expression of views by an employer becomes "coercion, threats, promises or undue influence", which are prohibited by the section. As noted in the *Dylex Limited* case, [1977] OLRB Rep. June 357, in seeking to establish where the line lies, the Board starts with the presumption that employees recognize that employers are generally not in favour of having to deal with employees through a trade union, and that, therefore, it ought not to surprise them if their employer indicates that he would prefer it if they did not support the union. On the other hand, however, the Board is also aware that an employee may be particularly vulnerable to employer influences. An employer cannot, when expressing his views, make statements that may be reasonably construed by employees to be an attempt by means of coercion, intimidation, threats, promises or undue influence to interfere with their freedom to join and support a trade union of their choice.

26. Although we are of the view that in their discussions with employees neither Mr. Wilson nor Mr. Pittarelli directly threatened any employee, we are deeply concerned about their conduct in speaking with employees on a one-to-one basis about the union. We do not believe that much turns on the question of whether Mr. Ross and Miss Crisman were actually asked if they had joined the union. It is clear that management engaged them in one-on-one discussions about the union in which management was likely to ascertain whether or not they were union supporters. It is acknowledged that Mr. Pittarelli asked both Mr. Ross and Miss Crisman why they had joined the union. The action of senior management in talking with individual employees about the union and indicating management's opposition to the union likely had a greater impact on the employees than if they had been addressed as part of a larger group or if they had read management's views in a printed letter. In this regard we view as noteworthy Mr. Pittarelli's testimony that at the commencement of his meeting with Miss Crisman, she commented that she should have listened to her mother and stayed away from unions. The implication we gather from this comment is that because of the interest shown in her by management relating to the union, Miss Crisman concluded that somehow she had acted improperly in involving herself with the union. In our view, the actions of Mr. Pittarelli and Mr. Wilson in engaging in one-on-one discussions with Mr. Ross and Miss Crisman about the union involved an interference with their right to select a trade union. We view their actions as an attempt to unduly influence employees which went beyond the freedom to express their views provided for in section 64 of the Act. In this regard we would adopt the following reasoning of the National Labour Relations Board in the *Peoria Plactic Co.* case, 29 LRRM 1281.

Under the circumstances of this case, we find it unnecessary to determine whether or not, during the course of the private interviews with employees in the unit at their homes, the President and Vice-President of the Company threatened to close the plant or stated that they would never sign a contract with the Union. We find that the cumulative effect of the interviews, which admittedly established Employer's disapproval of Petitioner, held with a majority if not all, employees in the unit immediately before the election, was to interfere with a free choice of bargaining representative regardless of the non-coercive tenor of the Employer's actual remarks. While we have made it clear, that absent unusual circumstances, both Employers and Unions are free to use any legitimate methods of electioneering, we have, at the same time, consistently condemned the technique of calling all or a majority of the employees in the unit into the Employer's office individually or calling upon them at their homes to urge them to reject a union as their bargaining representative as conduct calculated to interfere with the free choice of a bargaining representative regardless of whether or not the Employer's actual remarks were coercive in character.

In all the circumstances, we find that Mr. Wilson and Mr. Pittarelli, and through them the respondent, violated section 64 of the Act. We do not, however, believe that their statements also amounted to violations of sections 66 and 70.

35. During the individual meetings demanded by John Degroote, he specifically discussed the union, and asked each employee what was going on with respect to the union organizing campaign in the restaurant. In his meeting with Vollbregt, he identified the three union organizers and told her he knew she had signed a card. That both Vollbregt and Degroote considered themselves more than mere acquaintances does not excuse such conduct. Unilaterally imposed conduct which is otherwise an unfair labour practice does not become innocent and blameless because of an existing friendship between two people. (We do not suggest that Degroote and Vollbregt were other than friends.) From those interviews, employees would clearly have viewed and understood management to be opposed to the union, and given Degroote's manner and clear indication that he took personally the entire union organizing drive, employees would further have understood that they had somehow acted improperly if they supported the union. We also view those interviews as a clumsy attempt by Degroote to ascertain whether the employees he spoke to were for or against the union, and as presenting a message to all employees, that management was going to make some attempt to ascertain whether specific employees had joined the union, or alternatively, what specific employees knew about the union organizing drive. These conversations, their tenor and their content, were designed in part to either put pressure upon employees to oppose the union, or

alternatively, exert undue influence upon employees to disclose to management the substance and extent of the union organizing drive. Holding the meetings for either of these purposes, or conveying during those meetings either of these management concerns or objectives, constitutes a violation of sections 64, 66(c) and 70.

36. Turning to the meetings held with individual employees, during which employees were given their bonus cheques, Simpson testified that although he discussed various problems with the employees, in the three meetings he held the union was not discussed nor was it mentioned. The timing of events, Simpson's evidence that he decided on the bonuses March 12 but said nothing to Degroote about them until after he knew about the union drive, and the fact that Payne did discuss the union in these meetings, raise some suspicions about what occurred in the meetings held by Simpson. However, we found him to be a credible witness and on balance we accept his evidence, and are satisfied he did not discuss the union in any respect during his meetings with individual employees.

37. However, regardless of whether the union was discussed during meetings when the bonuses were paid, we find that those meetings and payments, together, constituted breaches of section 64 of the Act. Employees barely knew Simpson and Payne, as both had been based in Ottawa until the end of February. Employees had never had individual meetings with either of them, nor had they ever received such bonuses before. Although Simpson made the decision that bonuses were to be paid before he knew of the union drive, there was no evidence he decided to hold the one-to-one meetings before he became aware of the drive. We do know he announced to Degroote and the employees his intention to pay the bonuses only after he knew of the organizing. In these circumstances, we are satisfied that the scheme of payment of the first-time gratuitous bonuses, given by a relatively unfamiliar senior manager during a one-to-one meeting of a kind never before held with the individual employees, was a scheme designed in part to exert influence on employees to oppose the union. That Payne, at least, discussed the union when he met with employees is confirmatory of this conclusion. As the United States Supreme Court noted in *NLRB v Exchange Parts Co.* [1964], 375U.S. 405 (per Harlan J.):

“The danger inherent in well timed increases is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow, and which may dry up if it is not obliged.”

Management chose to use a “carrot” rather than a “stick”, but in the circumstances it was still undue influence, and accordingly was a breach of the Act.

38. We turn now to remedial relief. We have found that the petition was not voluntary, and we therefore give no weight to it. The applicant's right to certification cannot be affected by the Board's ultimate decision respecting the individuals in dispute with respect to their inclusion or exclusion from the bargaining unit, as discussed in the prior decision of the Board in these proceedings. On the basis of all the evidence before us, the Board is satisfied that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 4, 1986, the terminal date fixed for this application, and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

39. Therefore, pursuant to the Board's discretion under section 6(2) of the Act, and pending the final resolution of the description of the bargaining unit, the Board certifies the applicant for all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managers and those above the rank of manager. The individuals identified as in dispute in the prior Board decision of April 16, 1986 will remain excluded from the unit until such time as the parties

agree to their disposition, or until the Board Officer has completed his or her inquiry and the Board has resolved their status and the description of the bargaining unit. A formal certificate must await a final determination of the appropriate bargaining unit.

40. With respect to the breaches of the Act, we again refer to *J. Pascal Inc.*, *supra*:

30. This is not a case where the employer has threatened the job security of employees should they decide to join a trade union. Neither is it a case where the employer has engaged in a pattern of misconduct which would undermine the confidence of his employees in the viability of the Act and the protections afforded them in the exercise of their rights under the Act. In addition, the evidence falls far short of establishing that the employer's conduct brought the union organizing campaign to an end. Apart from the possibility that "some" employees may have been telephoned after this time, it is clear that Mr. Frechette stopped meeting with employees in an attempt to get them to sign union cards. A substantial number of bargaining unit employees were never contacted at all by Mr. Frechette. In our view, this is not a case where it would be appropriate to certify the union pursuant to the extraordinary provisions of section 8.

The case before us is similar to the *J. Pascal* case in that this is not a case in which the respondent has threatened the job security of employees, nor a situation where the respondent has engaged in a pattern of misconduct seeking to dissuade employees from the exercise of their rights under the Act. What has occurred rather, are isolated incidents of various officers of the employer committing breaches of the Act, in their desire to stem the union organizing flow. Having regard to our finding that the respondent has violated the Act, the respondent should be required to post notices advising employees that the Board has found it to be in violation of the Act and also advising employees of their rights under the *Labour Relations Act*. Accordingly, the respondent is directed to post signed copies of the notice marked "Appendix" to this decision in conspicuous places where they are likely to come to the attention of employees in the bargaining unit, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that it can satisfy itself that this posting requirement is being complied with.

41. This concludes a consideration of the merits of this proceeding, and we turn finally to an issue concerning the admissibility of certain evidence with respect to the petition. At the hearing, after hearing the evidence of the respondent's first two witnesses, counsel for the respondent sought to call a third and final witness. Counsel for the respondent indicated he wanted to call this witness for the sole purpose of questioning her with respect to custody of the petition during the period when she had sole possession, and further, that he only decided to call her as a witness because of the impression he had formed from settlement discussions that occurred after the commencement of the hearing. The Board ruled that it would not allow this witness to be called by the respondent. Counsel for the respondent thereupon indicated he had no further evidence to call, subject to his express reservation that he objected to the Board's decision and that he would be requesting that the Board reconsider its decision in that regard. The evidence being concluded, final submissions were entertained, and the Board adjourned the proceedings, reserving its decision.

42. Prior to rendering the decision set out here above, the Board received a request for reconsideration from counsel for the respondent, seeking reconsideration of the ruling preventing him from calling the witness in question, and asking that the hearing be reopened to allow him to do so. Having considered the submissions in support of this request, and the submissions of counsel for the union in response, we decline to reopen the hearing to allow counsel to call the witness.

43. Counsel for the respondent indicated in his submissions at the hearing that the *sole* pur-

pose of calling the witness to testify was to fill in the gap with respect to custody of the petition. In reaching our decision, we have not found it necessary to consider whether concern over custody of the petition might render it involuntary. For the other independent and unrelated reasons set out above, we have concluded that the petition is involuntary, and the witnesses' testimony, as counsel submitted at the hearing, would not have touched on the reasons we have found the petition to be involuntary. Whether or not we were correct in not allowing the witness to be called, the evidence we were advised she would have given would not in any manner touch on our decision and the conclusions we have reached. Even if we had no concern about custody of the petition, we would still find the petition to be involuntary and the respondent to have breached the Act as it did. To hear the evidence now would serve no purpose.

44. In his reconsideration request counsel raises for the first time additional, quite different, reasons for calling the witness. He thus seeks by way of reconsideration to raise matters he could have and ought to have raised when making his submissions at the hearing. The Board will not allow counsel to only now raise these matters as a basis upon which we should allow him to call the witness. Reconsideration is not an opportunity for counsel to raise new matters that could have been and should have been addressed at the hearing, and are only raised after the hearing for the first time. Further, even if we were to allow the respondent to call the witness to be questioned with respect to the new matters counsel now suggests she will attest to, that evidence would only touch on the circumstances under which Sepejak collected signatures, as discussed in ¶30, *supra*. If we accept as true all that counsel submits the witness would give evidence of, we would still find the petition involuntary, for the reasons set out in ¶'s 27 to 29, and still reach the same conclusions with respect to the section 89 complaint. Hearing her evidence would therefore only delay matters, to no useful purpose and we accordingly decline to reopen the hearing on this ground as well.

45. That concludes this stage of these proceedings. All that remains is the consideration and disposition of the individuals in dispute with respect to the bargaining unit. That matter, as noted above, is referred to a Board Officer. This panel is not seized.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I disagree with my colleagues on two matters. I would find that the petition is voluntary and the employer has committed no unfair labour practice.

2. With respect to the petition, the reasoning of the majority effectively nullifies the petition process by objecting employees before the Board. Time and again the Board has stated that it logically follows that employees will feel that their employer is opposed to union organization. Now the actual existence of employer opposition to the union, (absent any other unfair labour practice), is enough to "taint" a petition and make it involuntary. If the standard is that an employer must not indicate to employees that it is opposed to the union, and must persuade the Board of that fact, then I suggest we should no longer invite employees to become involved in a process that could reasonably be described as a charade.

3. There is absolutely no evidence that Ms. Vollbregt was threatened or coerced at the meeting with Mr. Degroote. She testified that she was made uncomfortable and upset by the meeting because she felt Mr. Degroote was taking advantage of their friendship. She agreed that she had not been threatened or coerced by Mr. Degroote. It is noteworthy that what my colleagues describe as "a clumsy attempt by Degroote to ascertain whether the employees he spoke to were for or against the union", was done in contravention of the instructions given to Mr. Degroote by the employer.

4. My colleagues choose to disregard the effect of the evidence that:

- (a) Messrs. Simpson and Payne arrived on the scene *before* the employer learned of the union campaign;
- (b) Messrs. Simpson and Payne came to Toronto *because* they had learned of the employees' dissatisfaction with the effect that renovation work was having on their wages and tips; and
- (c) The employer made the decision to pay bonuses *before* it learned of the union campaign.

5. With the reasoning of my colleagues, an employer in such a situation finds itself caught between the proverbial rock and a hard place. If the employer refuses to act on the expressed concerns of the employees then both employee morale and the business suffer. If it decides to pay bonuses and subsequently learns of a union campaign, it cannot rescind the decision. That would be an unfair labour practice. But when it pays the bonuses the employer representatives must not meet personally with the employees. Such actions become a "scheme", and the bonuses become a "carrot". Employers who find themselves in such a position must wonder how the Board perceives the problems involved in doing business in this Province. Can they no longer communicate with their employees once a union appears on the scene?

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION FULLY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN OUR ATTEMPTS TO INFLUENCE EMPLOYEES NOT TO SUPPORT THE UNION.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THE RIGHT:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A
TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH
THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON EMPLOYEES, WHETHER THROUGH
MEETINGS, INDIVIDUAL CONVERSATIONS, OR OTHERWISE, TO PREVENT EMPLOYEES FROM EXERCISING
THEIR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

HAYLOFT STEAKHOUSE LIMITED

PER: _____
AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2211-86-R Independent Plumbing & Heating Contractors Association, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Respondent v. Metropolitan Plumbing & Heating Contractors' Association, Intervener

Accreditation - Bargaining Unit - Construction Industry - Accreditation sought for low-rise part of residential sector of the construction industry - Accreditation certificate issued in 1973 for entire residential sector but employers association had never exercised the bargaining rights granted in respect of the low-rise part of the residential sector - Earlier refusal by Board to divide the residential sector into high-rise and low-rise parts - Bargaining rights for low-rise part of sector declared abandoned - Pattern of collective bargaining at time application made looked at - Bargaining unit described in terms of low-rise part of residential sector appropriate - Accreditation certificate issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *George W. Adams, Q.C., Richard Charney, Bill Gohn and Adelchi Franzolini* for the applicant; *Bryan Hackett, Laurence Arnold and Vince McNeil* for the respondent; *Mark Geiger, Robert Salisbury, Martin Rosenbaum and Ed Winter* for the intervener.

DECISION OF THE BOARD; May 6, 1987

1. This is an application for accreditation by which the applicant seeks to become the bargaining agent for a group of employers. The respondent is party to collective agreements with 32 employers in the construction industry which cover units of employees in the construction industry encompassing the geographic area and sector of the construction industry for which the applicant seeks bargaining rights. Therefore, this application is properly before the Board under section 125 of the *Labour Relations Act*.

2. The applicant is an unincorporated association. It entered into an arrangement with the Toronto Construction Association on October 1, 1985 by which the Toronto Construction Association provides the necessary administrative and secretariat services to the applicant. The Board received detailed evidence concerning the formation of the applicant and its ongoing activity. The applicant has a constitution that was formally adopted at a membership meeting on March 25, 1986. The constitution provides for membership and the manner in which members may be admitted, initiation fees and membership dues, annual and special meetings of members, a board of directors and meetings of the board of directors, the offices of president, vice-president, secretary and treasurer and contains other provisions enabling it to carry on its affairs. At a membership meeting on October 15, 1986, the election of the board of directors and officers was ratified by the members. The applicant has a bank account and has appointed auditors.

3. The objects of the applicant are set out in article II of the constitution which provides:

"The objects of the Association shall be:

- A) to provide leadership and assistance to its members.
- B) to speak with authority as the voice of its members.
- C) to provide a forum for the free discussion of subjects relative to the mechanical contracting industry.

- D) to act on matters relating to our industry that effects its members' interests.
- E) to promote and maintain improved methods of business.
- F) to promote and improve tendering practices and jobbing procedures.
- G) to increase the knowledge, skill and proficiency of members and their employees.
- H) to represent members in their relations with professional bodies and related associations.
- I) to represent members before Legislative Committees, Boards of Enquiry, Commissions and other similar bodies.
- J) to promote public relations and goodwill for its members.
- K) to represent all contractors whom the Association has the authority to represent in negotiations, general application and administration and the interpretation of collective agreements and in the arbitration of labour disputes.
- L) to become an accredited employers organization under the Labour Relations Act as amended from time to time or any legislation substituted therefor and to regulate relations between employers and employees in the mechanical trade and all ancillary and allied trades.
- M) to undertake all matters as are necessary or incidental to the promotion and attainment of the objects of the Association."

4. The employers whom the applicant represented on the application date executed employer authorizations. Those authorizations are signed by persons who are stated to be authorized signing representatives of the employers and are sealed by the employers' corporate seals where the employers are incorporated. The employer authorizations are in the following form:

EMPLOYER AUTHORIZATION

RETURN TO: Independent Plumbing & Heating
Contractors Association
1 Sparks Avenue
Willowdale, Ontario
M2H 2W1

RE: ACCREDITATION AUTHORIZATION

FULL COMPANY NAME: _____

ADDRESS: _____

TELEPHONE NO.: _____

_____ (the "Company"), hereby authorizes and appoints the INDEPENDENT PLUMBING & HEATING CONTRACTORS ASSOCIATION (the "Association") as its agent and representative to make an Application for Accreditation under the *Labour Relations Act* of the Province of Ontario and to thereafter act as its accredited bargaining agent, in regard to the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, Local 46, for the following geographic area and sector:

Sector - Residential (Low Rise), or such modification of said sector as the Association may apply for or the Ontario Labour Relations Board may require.

Geographic Area - The geographic area for which the Union currently holds bargaining rights for the employees of the Company, being the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, or such modified description of Board Area No. 8 as the Association may apply for or the Ontario Labour Relations Board may deem appropriate.

Authorized signing
representative _____

Signature PER: _____

Date _____

Corporate Seal
(where applicable)

5. Based on the oral and documentary evidence adduced at the hearing, we are satisfied that the applicant is an employers' organization within the meaning of section 117(d) of the Act and that it has been properly constituted. Furthermore, in view of article II of the applicant's constitution, and in particular, paragraphs K and L of article II and the employer authorization forms executed by the employers represented by the applicant, we are satisfied that each of the employers that the applicant represents has vested appropriate authority in the applicant to enable it to discharge the responsibilities of an accredited bargaining agent for purposes of section 127(3) of the Act.

6. At the hearing of this matter, the parties advised the Board that they had reached an agreement on the description of the unit of employers appropriate for collective bargaining. That agreed upon description is:

all employers of plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders on whose behalf the respondent has bargaining rights in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham in the low-rise part of the residential sector of the construction industry.

The parties also agreed upon a definition for the low-rise part of the residential sector of the construction industry.

7. The Board ruled at the hearing of this matter that the agreed upon description of the unit of employers was appropriate for collective bargaining. In doing so, we recognized that we were segregating a part of a sector for purposes of determining the appropriate bargaining unit of employers.

8. Section 126(1) of the Act states:

"Upon an application for accreditation, the Board shall determine the unit of employers that is

appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.”

That section permits the Board to determine the unit of employers appropriate for collective bargaining by reference to part of a sector where, in the Board’s opinion, it is appropriate to do so.

9. In 1973, the Board granted an accreditation certificate to the Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto in respect of the entire residential sector of the construction industry in the geographic area affected by this application. See *Metropolitan Plumbing and Heating Contractors Association, a division of Mechanical Contractors Association Toronto*, [1973] OLRB Rep. April 199. The Mechanical Contractors Association Toronto, although given notice of this proceeding, did not intervene. Indeed, the Board was advised at the hearing of this matter that the Mechanical Contractors Association Toronto had not exercised the bargaining rights granted in respect of the low-rise part of the residential sector of the construction industry since being named in the accreditation certificate.

10. Section 107 of the Board’s Rules of Procedure states:

“An employers’ organization, ... that is served with a notice of application [for accreditation] or that claims to have an interest in the application, shall file its intervention, if any, in quadruplicate in Form 91 not later than the terminal date for the application and, if it fails to file such an intervention, it may be deemed by the Board to have abandoned any claim to have any interest in the application.”

11. Based on the advice received by the Board at the hearing of this matter and having regard to the failure of the Mechanical Contractors Association Toronto to file an intervention, the Board is satisfied that the Mechanical Contractors Association Toronto had abandoned any bargaining rights that it held with respect to the low-rise part of the residential sector of the construction industry in the geographic area affected by this application.

12. Additionally, counsel for the intervener advised the Board that the intervener has not exercised any bargaining rights it held in respect of the low-rise part of the residential sector of the construction industry in the geographic area affected by this application. Counsel for the intervener submitted that because the intervener had not exercised bargaining rights in that part of the sector and geographic area at any time it should be taken to have abandoned its bargaining rights for employers in that part of the residential sector and geographic area whom the applicant seeks to represent.

13. The Board in *Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association Toronto*, *supra*, refused to divide the residential sector into high-rise and low-rise parts. The Board in that case wrote at page 200-201:

“Counsel for the intervener has requested that the Board divide the residential sector into two parts and that the order in this case should be limited to only one of these parts. The distinction made by counsel was between high rise residential construction and low rise residential construction. The basis for this distinction is that the work characteristics in high rise construction are different from the work characteristics in low rise construction. In light of this distinction counsel suggests two reasons why the Board should limit the accreditation order to high rise residential construction and should exclude from the order low rise residential construction. The first reason is that because of the differences in work characteristics between these two types of construction there is no community of interest or interchange between employers in these two parts of the residential sector. The second reason forwarded by counsel for the intervener was that whereas high rise residential construction is generally performed by ‘unionized contractors’

the work performed in low rise residential construction is generally performed by 'non-unionized contractors'; the affect of an accreditation order covering both sectors might very well lead to a 'misuse' of the accreditation order for the purpose of organizing unorganized employees in low rise residential construction.

The applicant and the respondent both take the position with respect to these arguments by the intervener that there is no valid distinction to be made between high rise and low rise residential construction, and that the reasons proposed for limiting the accreditation order to high rise construction are not valid. The applicant further submits that even if the Board finds that the residential sector of the construction industry is made up of two such parts then the applicant is entitled to be accredited in both parts.

We will first deal with the argument of the intervener that because of the different work characteristics there is little community of interest between these two types of construction. The Board heard evidence that in certain instances there is a difference in the materials used in these two types of construction. However, the major difference seems to be that in high rise residential construction the work is done by a larger group of workmen performing specific jobs at the job site. On the other hand in low rise residential construction it would appear that the work is done by a few men who perform all of the jobs in a dwelling unit. There does not, however, appear to be a great deal of difference in the net result of the work done and it would appear that skilled workmen in the one type of construction could quite readily perform the tasks involved in the other type of construction. It is not therefore clear as to why there is no community of interest as suggested by the intervener. If the reason is merely the fact that low rise residential contractors are small contractors who don't bid on high rise construction jobs because they lack the manpower or capital, then such a distinction cannot be the basis for fragmenting the sector. Such a difference in size is already protected by the requirement that an applicant association obtain a 'double majority' of the contractors in an appropriate unit of employers for collective bargaining in accordance with section 115(1) of the Act.

If we examine the second argument for limiting the accreditation order to high rise residential construction, namely, that the order may be misused by the respondent as an organizing tool, an accreditation order only affects employers who have a bargaining relationship with the trade union with respect to which the employers' organization is an accredited employers' organization. It is true that the Act provides that any contractors for whom that trade union obtains a certificate as the bargaining agent of its employees is by the operation of section 116 bound by any collective agreement in existence between the accredited employers' organization and the trade union. However, we can see no difference between the position of the members of the intervener who are 'unorganized' and any other employer in any other sector where an accreditation order is issued. Indeed, given the clear language of subsection 4 of section 116 of the Act we can only conclude that such a result was contemplated by the Legislature.

In view of the foregoing we do not see any merit in the arguments for limiting the accreditation order to one part of the residential sector of the construction industry. However, we are also of the opinion that the distinction between high rise residential construction and low rise residential construction has not been made in such a manner as to convince the Board that the residential sector should be divided into two such parts. Indeed, counsel for the intervener found it very difficult to suggest anything other than a criteria which was admittedly arbitrary in distinguishing between these two parts of the residential sector. The witness called by the intervener suggests that the best criterion was probably whether or not there was an elevator in the building. Thus, those buildings without elevators were low rise residential construction whereas those with an elevator were high rise residential construction. It was not made clear what an elevator had to do with distinguishing between the work characteristics of these two types of construction. Further, the evidence tendered in support of this distinction was not such as to show an overwhelming difference between the installation of plumbing in a house and installation of plumbing in an apartment. We are of the opinion that unless there are clear and compelling reasons to divide a sector into parts the Board ought not to unnecessarily fragment the sectors of the construction industry set out in clause (e) of section 116 of the Act."

14. In our opinion, there are in this case clear and compelling reasons to divide the residential sector of the construction industry in the geographic area for which the applicant seeks bargain-

ing rights, that is Board geographic area 8, into two parts. In doing so, we are not creating a new sector of the construction industry. Sectors of the construction industry are determined on the basis of work characteristics (see section 117(e) of the Act) and can usually be ascertained by reference to the end use of the construction. See *The Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245 at 247-249. There was nothing presented to us to suggest that the work characteristics associated with the low rise part of the residential sector of the construction industry in Board geographic area 8 warrant finding that it is a discrete sector of the construction industry.

15. While we are not concerned here with defining a sector of the construction industry, we are determining a unit of employers appropriate for collective bargaining. In making that determination regard must be had to the pattern of collective bargaining that exists at the time the application for accreditation is made. The determination of the appropriate bargaining unit ought to be supportive of the bargaining structure that the parties have fashioned unless that structure is not a viable one under the Act.

16. In the *General Contractors Section of the Toronto Construction Association*, [1971] OLRB Rep. Nov. 719 the Board combined the industrial, commercial and institutional sector and the heavy engineering sector of the construction industry in describing the appropriate bargaining unit and excluded from that bargaining unit the electrical power systems sector based on the pattern of work performed by employers in those sectors. The Board based its exclusion of the electrical power systems sector from that bargaining unit by considering the existing structure of collective bargaining in that sector. The Board wrote in that case at page 722-723:

“Having regard to the evidence that the employers for whom the applicant is seeking accreditation by and large do work in both the industrial, commercial and institutional sector and the heavy engineering sector and the evidence of the interchange of rodmen working for a single employer between the two sectors, the Board in these circumstances deems it advisable to combine the industrial, commercial and institutional sector and the heavy engineering sector.

Having regard to the evidence of what appears to be a highly complicated structure of collective bargaining in the electrical power systems sector, the Board is not satisfied that the electrical power systems sector is appropriate for inclusion in the unit of employers in the instant application. With respect to the road sector, the evidence is that virtually no rodmen are employed in that sector. For this reason, the Board also is not satisfied that the road sector is appropriate for inclusion in the unit of employers in the instant application.”

17. In *Mechanical Contractors Association Hamilton*, [1972] OLRB Rep. Nov. 923 the Board combined the industrial, commercial and institutional sector and residential sector in one bargaining unit based, in large part, on the fact that the collective agreements between the employers represented by the applicant for accreditation and the respondent union applied to both of those sectors and that the employers worked in both sectors. The Board stated at page 931:

“Nevertheless, the collective agreement in question does cover such work and some employers bound by the agreement do work in both sectors. If the residential sector is not included, then for the existing contract the applicant in its accredited capacity would administer that part of it in the one sector but not in the other. Further agreements would have to be negotiated separately for the two sectors and, of course, with different consequences flowing therefrom. Thus, one day an employer might be operating under one set of rules and under another on the next day. In fact, this could happen on the same day. In the event of a lawful strike or lockout the union would be entitled to bargain with individual employers in the residential sector and not in the industrial sector. Similarly, the union would be entitled to lawfully supply men to the residential sector but not to the industrial sector.

The question of combining sectors or parts thereof is a matter of discretion for the Board under section 114. Up to the present time the Board has had little experience in dealing with this question. In one case the Board refused to combine sectors (*The Ontario Erectors Association v.*

International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 et al [1971] OLRB Rep. (Aug.) 522 at 525), and in another (*The General Contractors' Section of the Toronto Construction Association v. International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 et al* [1971] OLRB Rep. (Nov.) 719 at 721), the Board acceded to such a request. These cases do not appear to be of assistance in the present application. On balance, we do not, on the basis of the evidence before us, see any substantial reasons for refusing to combine the sectors requested in this case.”...

18. *In Ontario Precast Concrete Manufacturers Association, Erectors Division* [1975] OLRB Rep. March 171 the Board discussed the inclusion or exclusion of sectors from the description of the unit of employers at pages 174-175:

“In considering the question of whether to include or exclude a sector one of the tests employed by the Board has been whether the employers involved in the accreditation application have worked in the sector. See for example the *General Contractors Section of the Toronto Construction Association v. The International Association of Bridge, Structural and Ornamental Ironworkers, Local 721*, (hereinafter referred to as *Ironworkers Local 721*) [1971] OLRB REP 719, where the Roads sector was excluded because employers affected were not working in this sector. See also *Mechanical Contractors Association Hamilton v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67*, (1972) OLRB REP 923 where the residential sector was combined with the industrial, commercial and institutional sector because the collective agreement in question covered both sectors and work was performed in both sectors though admittedly of a limited nature in the residential sector.

On the other hand the Board has been somewhat reluctant to exercise its discretion under section 114(1) to combine sectors and has not issued an accreditation certificate covering all of the sectors set out in section 106(e). Again the Board has not included the electrical power systems sector in any certificate issued up to this time. The issue was faced in the *Ironworkers, Local 721* case and the sector was excluded ‘having regard to the evidence of what appears to be a highly complicated structure of collective bargaining in the electrical power systems section’ Immediately following this portion of the decision the Board excluded the roads sector because the employers affected were not working in this sector. It is reasonable to assume from this that had the employers affected not been working in the electrical power systems sector the reason for excluding the roads sector would have applied equally to the case of the electrical power systems sector. But different reasoning was applied to that sector. This conclusion is reinforced by the fact that G. & H. Steel Service of Canada and Gilbert Steel Ltd. described in the *Ironworkers, Local 721* case as the companies which do the largest volume of work in the reinforcing steel field in the area affected by that case, were, on the evidence in this case, members of the intervener as of March 11, 1971. (See Exhibit #14). In any event the highly complicated structure of collective bargaining in the electrical power systems sector is given as the reason for excluding that sector in the *Ironworkers, Local 721* case.

On the evidence before us in this case it is clear that a highly complicated structure of collective bargaining was in existence in the sector at the time this application was made. The evidence also establishes that significant efforts are being made by the parties to that bargaining structure, and by certain employers, members of the intervener, to effect changes in that structure in order to establish an orderly industrial relations system in the sector. The evidence also establishes that in many respects the electrical power systems sector differs materially from other sectors and these differences should be taken into account in determining whether the collective bargaining structures, existing or proposed, in the sector should be materially altered. After having given careful consideration to all of the arguments advanced by the applicant and respondent for inclusion of the sector in the unit of employers in this case we do not consider it advisable in all of the circumstances to combine the electrical power systems sector with the other sectors involved in this case.”

19. The Board in *Quality Control Council of Canada* [1983] OLRB Rep. Jan. 140 reviewed the nature of the non-destructive testing industry and the collective bargaining relationships in that

industry in determining the unit of employers. The Board's determination in that case also reflected the structure of collective bargaining that was in existence at the time of the application.

20. The parties in this matter advised the Board that collective bargaining with the respondent in respect of the residential sector of the construction industry has been carried on by the intervener pursuant to the 1973 accreditation order and that such collective bargaining has excluded the low rise part of the residential sector. Both the intervener and the Mechanical Contractors Association Toronto have submitted that they have abandoned any bargaining rights that they have had in respect of that part of the residential sector before this application was made. The respondent and the employers represented by the applicant are parties to collective agreements that are applied to the low rise part of the residential sector. Additionally, the parties have agreed to a definition of the low rise part of the residential sector, thus avoiding the difficulties described in the Board's decision in the *Metropolitan Plumbing and Heating Contractors Association, A Division of Mechanical Contractors Association Toronto* case, *supra*. For these reasons, we were persuaded that there are, in the circumstances of this case, clear and compelling reasons to separate the low rise part of the residential sector of the construction industry.

21. Therefore, based on the evidence and submissions of the parties presented to the Board and having regard to the agreement of the parties, the Board finds that all employers of plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders on whose behalf the respondent United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 has bargaining rights in Ontario Labour Relations Board geographic area 8, that is the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham in the low rise part of the residential sector of the construction industry, constitute a unit of employers appropriate for collective bargaining.

22. For purposes of clarity, the low rise part of the residential sector is defined as:

1. all single and semi-detached family dwellings,
2. all row-house and townhouse units,
3. (a) all residential projects now governed by the existing N.B.C. requirements for plastic pipe and fire ratings,

(b) all projects of mixed usage, where the residential portion comprises 50 per cent or more which are now governed by the existing N.B.C. requirements for plastic pipe and fire ratings,
4. apartment buildings of not more than six units,
5. all projects of mixed usage, where the residential portion comprises 50 per cent or more and less than three floors.

• • •

[Remainder of decision omitted. Certificate of accreditation issued:
Editor]

2136-86-JD Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, Complainants v. COSMA, a Division of **Magna International Inc.**, Millwrights Unlimited, Association of Millwrighting Contractors of Ontario Inc., United Brotherhood of Carpenters and Joiners of America, Millwrights Local Union 1916, Mechanical Contractors Association Ontario, Respondents

Jurisdictional Dispute - Practice and Procedure - Applicant seeking only a direction for educational purposes and not an assignment of work - No labour relations purpose served by the Board entering into an inquiry for sole purpose of deciding whether the work was properly assigned - Complaint dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *I. M. Stamp* and *D. Patterson*.

APPEARANCES: *Stanley Simpson* and *Fred Wilson* for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67; no one appearing for the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; *Robert Salisbury* and *Bruce Chan* for COSMA, a Division of Magna International Inc.; *R. A. Werry* and *Dale Austin* for Millwrights Unlimited; *Charles Horman* for Association of Millwrighting Contractors of Ontario Inc.; *M. A. Church* and *Harvey Jardine* for the United Brotherhood of Carpenters and Joiners of America, Millwrights Local Union 1916; no one appearing for the Mechanical Contractors Association of Ontario.

DECISION OF THE BOARD; April 2, 1987

1. This complaint concerning work assignment, under section 91 of the *Labour Relations Act*, came on for hearing in Toronto on February 18, 1987. At the hearing, the name of the respondent Magna International Inc. was amended to "COSMA, a Division of Magna International Inc.". In addition, pursuant to the agreement of all concerned at the pre-hearing conference with respect to the complaint, the Association of Millwrighting Contractors of Ontario Inc. was added as a party respondent, and the complaint was amended by deleting the request for an interim order with respect to the work assignment and by adding the following as paragraph 1a to Schedule 3 thereof:

Around August 1986 and after, on more than one occasion, the business representative of Local 67 requested from the on-site foreman for Millwrights Unlimited an assignment of the work to members of Local 67. The foreman referred the business representative of Local 67 to the business representative of the Millwrights Union.

2. The Board then heard argument on two preliminary matters:

- a) whether COSMA, a Division of Magna International Inc. should have its status changed from "respondent" to "interested party" and the nature of the order, if any, that could be made against it by the Board; and

- b) whether the Board should exercise its discretion to not entertain this complaint.

3. The Ontario Pipes Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, named as a complainant by counsel filing the complaint, took no part in any of the proceedings before the Board, though duly notified of both the pre-hearing conference on December 17, 1986 and the hearing on February 18, 1987. Upon hearing the representations of the parties who attended the hearing, the Board concluded that it should not inquire into the complaint. Accordingly, the Board ruled orally, with written reasons to follow, that it had decided to exercise its discretion to not inquire into the complaint and the complaint was dismissed. The Board's reasons follow.

4. The description of the work in dispute was not relevant to the respondents' submission that the Board should not inquire into this complaint. Notwithstanding that, and the fact that there was no general agreement as to exactly what work was in dispute, the Board did hear that the work involved a project in Milton. M.I., a realty division of Magna International Inc., as owner, entered into an arrangement with another division of Magna International Inc., namely the respondent COSMA, a Division of Magna International Inc. ("COSMA"), whereby the latter was responsible for the installation of 19 large heavy metal stamping presses. Manufactured in West Germany, the presses are of a type entirely new to Canada and are designed to stamp out metal parts for the automobile industry. COSMA, in turn, subcontracted the fine rigging (as opposed to the rough rigging) aspect of the press installation to the respondent Millwrights Unlimited. Neither of the Magna divisions is party to any collective agreement. Millwrights Unlimited is bound to a collective agreement with the respondent United Brotherhood of Carpenters and Joiners of America, Millwrights Local Union 1916 ("Local 1916"). Pursuant to that collective agreement, Millwrights Unlimited employed members of Local 1916 to perform the work subcontracted to it by COSMA. It is the assignment of this work which the complainant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 ("Local 67") claims in the complaint as filed. On the face of the complaint as amended, Local 67 first required that the work be assigned to it some time in August 1986. Members of Local 67 were employed by another subcontractor with respect to another aspect of the project. The installation of the presses, which began in June 1986, was, at the date of the hearing, expected to be completed by early April 1987.

5. Counsel for Local 67 asserted that this complaint was fundamental to the complainant's trade jurisdiction. The only remedy sought in the complaint filed is "an assignment of the work to it [Local 67] alone". At the hearing, however, counsel for Local 67 stated in argument that that complainant did *not* seek an assignment of the work it claimed in its complaint with respect to either the Milton project or, pursuant to subsection 91(2), with respect to any other jobs, present or future. Rather, the Board was advised by counsel, Local 67 sought only a declaration for "educational" purposes and for use in future cases with respect to the general issue of which trade union the work in question, however described, belongs to. The Board understood Local 67 to be amending its complaint accordingly.

6. Subsection 91(1) of the Act provides that:

The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any

officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

None of the parties disputed the jurisdiction of the Board to entertain this complaint. However, all of the respondents took the position that the Board has a discretion to not inquire into this complaint and should exercise a discretion to not do so in the circumstances. The complainant Local 67, did not dispute that the Board possesses a discretion to not inquire into the complaint but urged the Board to hear it on its merits.

7. Under section 91, the Board has a broad discretion with respect to whether or not it will inquire into a complaint concerning the assignment of work. The typical such jurisdictional dispute scenario is well known to the Board (see, for example, *Eaman Riggs Limited*, [1978] OLRB Rep. March 228 at paragraphs 26 and 27). In the interest of labour relations stability in the construction industry, the Board has adopted a broad approach to such disputes so that, once satisfied that it has jurisdiction to do so, the Board will generally hear the complaint on its merits. The Board has not required a trade union that disputes an assignment of work to have a collective agreement with the employer involved (see, for example, *Simcoe Mechanical Contracting Limited*, [1981] OLRB Rep. July 1004). Nor has it required that two unions be involved (see, for example, *General Motors of Canada Limited*, [1986] OLRB Rep. Feb. 244), or that the dispute relate to persons in different trades or crafts (see *Simcoe Mechanical Contracting Limited*, *supra*, and at [1982] OLRB Rep. Sept. 1352). However, the Board does require that there be a dispute concerning the assignment of work with respect to which a direction is sought from the Board. Indeed, where the complaint is brought to the Board by a trade union or counsel of trade unions, the direction usually sought is that the work in dispute be assigned to its members.

8. When this proceeding came on for hearing, Local 67 no longer sought any direction whatsoever with respect to the assignment of the work in dispute. It sought only a declaration that that work should have been assigned to its members. At one level one can understand why Local 67 desires such a declaration. At another level, however, any such determination with respect to the complaint filed would be largely, if not wholly, academic. The criteria used by the Board in making determinations and directions under section 91 (that is, collective bargaining relationships; jurisdictional arrangements between unions; skill and training; considerations of economy and efficiency; the employer's practice; and area practice: see *Simcoe Mechanical Contracting Limited*, at [1982] OLRB Rep. Sept. 1352 and *Ontario Hydro*, [1983] OLRB Rep. June 932), are such that it is unlikely that any decision of the Board with respect to this complaint would have any real impact beyond the particular parties and circumstances of this case. In our view, it would serve no labour relations purpose for the Board to enter into an inquiry for the sole purpose of declaring whether or not, in hindsight, the work in dispute was assigned properly. Accordingly, the Board exercised its discretion under subsection 91(1) of the Act to not inquire into this complaint.

9. As a result of its disposition of that preliminary matter, the Board found it unnecessary to deal with the issue of the respondent COSMA's appropriate status in these proceedings and the complaint was dismissed.

1339-71-R Metropolitan Plumbing and Heating Contractors Association, Applicant v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Residential Division), Respondent v. Toronto Home Builders' Association, Intervener

Accreditation - Reconsideration - Reconsideration sought of 1973 accreditation decision issued by a differently constituted panel of the Board - Bargaining rights in respect of low-rise part of residential sector never exercised - Board excluding low-rise part of residential sector from accreditation certificate - Low-rise part of residential sector defined

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Mark Geiger*, *Robert Salisbury*, *Martin Rosenbaum* and *Ed Winter* for Metropolitan Plumbing and Heating Contractors Association; no one for the Mechanical Contractors Association Toronto; *Bryan Hackett* and *Laurence Arnold* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; May 6, 1987

1. Counsel for the Metropolitan and Heating Contractors Association has applied for reconsideration of the decision and certificate of accreditation dated April 4, 1973 issued by a differently constituted panel of the Board.

2. This matter has come before this panel of the Board at the same time as an application for accreditation in Board File No. 2211-86-R. The Mechanical Contractors Association Toronto, although served with notice of that application, did not appear or file an intervention. Although formal notice that the Board would consider counsel's request for reconsideration at the hearing of that matter was not given to the Mechanical Contractors Association Toronto, we were advised at the hearing on April 9, 1987 by counsel for the applicant herein that he had spoken to Derwent Lewis, executive vice-president of Mechanical Contractors Association Toronto on April 9, 1987. Mr. Lewis was advised that the Metropolitan Plumbing and Heating Contractors Association was seeking to have the accreditation decision and certificate amended by:

- i) deleting any reference to Mechanical Contractors Association Toronto in the decision and certificate, thus making explicit that the Metropolitan Plumbing and Heating Contractors Association is the accredited employer's organization;
- ii) amending the geographic scope of the bargaining unit in the accreditation decision and certificate to include explicit reference to the Municipality of Metropolitan Toronto; and
- iii) amending the sectoral scope of the bargaining unit in the accreditation certificate and decision by excluding the low-rise part of the residential sector of the construction industry.

3. Counsel stated that Mr. Lewis authorized him to advise us that the Mechanical Contractors Association Toronto was aware of the request made by counsel, had no interest in intervening in the request to amend the decision and certificate of accreditation in the manner described and was content to have the Board deal with the request for reconsideration at the hearing convened by the Board in the application for accreditation in Board File No. 2211-86-R on April 9, 1987.

4. Counsel for Local 46 was present and agreed to the amendments requested by the Metropolitan Plumbing and Heating Contractors Association.

5. Counsel for the Metropolitan Plumbing and Heating Contractors Association, in a letter dated December 15, 1986, set out the detailed factual and legal submissions in support of the request for reconsideration. We are persuaded that the current bargaining structure which has evolved since the 1973 accreditation decision and certificate, the consent of Local 46 and the position taken by the Mechanical Contractors Association Toronto all provide sufficient grounds to vary the accreditation certificate as requested. Of particular significance, in our opinion, is that notwithstanding that bargaining rights were granted in respect of the residential sector of the construction industry, those bargaining rights were not exercised in respect of the low-rise part of that sector. It is clear to us that the accredited employers' organization in this case had abandoned its bargaining rights in respect of the low-rise part of the residential sector.

6. Therefore, we hereby vary the Board's decision and certificate of accreditation dated April 4, 1973 by amending the name of the applicant to Metropolitan Plumbing and Heating Contractors Association, and by amending the bargaining unit description in paragraph 12 of the Board's decision of April 4, 1973 and the bargaining unit set out in the certificate of accreditation under the same date to read as follows:

The Board therefore finds that all employers of plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders for whom the respondent has bargaining rights in the Municipality of Metropolitan Toronto, the Regional Municipality of York, that portion of Ontario County lying West of Pickering- Whitby Townships Line, Peel County, that portion of Halton County lying South of Highway 401 and East of the Seventh Line and Dufferin County in the residential sector of the construction industry, save and except the low-rise part of the residential sector of the construction industry, constitute a unit of employers appropriate for collective bargaining.

7. For purposes of clarity, the low-rise part of the residential sector of the construction industry is defined as:

- i) all single and semi-detached family dwellings;
- ii) all row-house and townhouse units;
- iii) (a) all residential projects now governed by the existing N.B.C. requirements for plastic pipe and fire ratings;
- (b) all projects of mixed usage, where the residential portion comprises 50 per cent or more and which are now governed by the existing N.B.C. requirements for plastic pipe and fire ratings;
- iv) apartment buildings of not more than six units;
- v) all projects of mixed usage, where the residential portion comprises 50 per cent or more and less than three floors.

8. An amended certificate of accreditation will issue.

3330-86-M International Union of Operating Engineers, Local 793, Applicant v. Nadrofsky Corporation, Respondent

Construction Industry Grievance - Whether in circumstances it was appropriate for the Board to exercise its discretion to substitute some other penalty for the suspension imposed by the respondent on the grievor - Deference by arbitrator appropriate as long as employer considers only relevant factors when imposing discipline - Disciplinary response must fall within range of just and reasonable penalties - Ten day suspension substituted for suspension imposed by employer

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *Jack J. Slaughter*, *E. A. Ford* and *M. Millar* for the applicant; *Norman A. Keith* and *Don Nelson* for the respondent.

DECISION OF THE BOARD; May 28, 1987

1. This is a referral of a grievance in the construction industry to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. The grievance alleges that the respondent suspended the grievor, Mark Millar, for Friday, February 13, 1987 and the three week period beginning February 16, 1987 without just cause. Although the grievance requests that the suspension be rescinded without loss of seniority to the grievor and with compensation for all wages and benefits lost by him as a result of the suspension, the applicant agreed at the hearing that some discipline was justified but that the Board should exercise its discretion under section 44(9) of the *Labour Relations Act* to substitute a lesser penalty for the suspension imposed.

2. The respondent Nadrofsky Corporation is a crane rental company that operates conventional and hydraulic cranes throughout Canada, but mainly in Ontario and the eastern provinces.

3. The grievor has been employed by the respondent for approximately six years. Although he holds an operator's licence, his position with the respondent is that of a "front-end man" or "oiler" (the terms refer to the same job classification). As such, he assists the crane operator with whom he has been teamed in moving the crane to which they are assigned from job site to job site. On the larger hydraulic cranes this involves removing counterweights, rigging and short boom sections, and transporting these on a truck, driven by the oiler, behind the crane vehicle. The truck follows the crane vehicle for highway safety reasons and to provide assistance in the event of any breakdown of the crane vehicle. Once at a new job site, the oiler assists in setting up the crane. He is also responsible for its general maintenance and cleaning. The oiler works under the direct supervision and instruction of the crane operator. Since July 1986, the grievor has usually been, and was at all material times, teamed with a crane operator named Roger Monchalin.

4. The applicant and the respondent are bound by the provincial collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency effective from July 24, 1986 to April 30, 1988. Article 26 of that agreement specifies certain equipment manning requirements. Article 26.1(c) provides:

(c) The following shall be manned by one (1) operator and one (1) apprentice, oiler or oiler driver.

(i) All conventional truck mounted cranes with a manufacturers rating of 25 tons capacity and over.

- (ii) All crawler cranes with a manufacturers rating of 70 tons capacity and over.
- (iii) All truck mounted hydraulic cranes with a manufacturers rating of 50 tons capacity and over.
- (iv) All rough terrain type cranes with a manufacturers rating of 65 tons capacity and over.
- (v) All rubber mounted cranes used for pile driving.
- (vi) All G.C.I. Type cranes.
- (vii) All backhoes, shovels, clams & draglines with a capacity over 1 3/4 cubic yard.
- (viii) All caisson boring type equipment over 25 Horsepower.

Article 4 of Schedule A to the agreement specifies the circumstances under and the manner in which bargaining unit employees are to be paid commuting and living expenses. The respondent relies upon the provisions of Article 26.1 (c)(iii). The applicant relies on Article 4 in Schedule A in responding to that argument and to explain the grievor's conduct.

5. The evidence establishes that, at all material times, the grievor was assigned to a 250 ton truck mounted hydraulic crane. The respondent asserted that the provisions of Article 26.1(c)(iii) require that whenever such a crane is being operated or moved it must be manned by one operator and one apprentice, oiler or oiler driver, and that when the crane is out of town (that is, out of Brantford) the two employees assigned to it are to stay out of town together with it. In denying that interpretation of Article 26.1(c)(iii), the trade union points to Article 4 of Schedule A to the agreement and the respondent's failure to pay such allowances in advance to an employee who is required to stay out of town. Whether or not this is a proper interpretation of that provision, the evidence establishes that Article 26.1(c) is not invariably applied when a crane that is covered by it is moved from one job site to another. On the respondent's own evidence, the company itself sometimes issues instructions that the crane vehicle and support truck travel separately for reasons of economy. At best, it is a general practice, not a strict requirement, that an operator and oiler travel and stay out of town together, and it is evident that if an operator and oiler make other arrangements between themselves that is acceptable to the respondent. In addition, it appears that the respondent does not generally pay living allowances in advance as required by the collective agreement, but just as Article 26.1(c)(iii) is not strictly applied or enforced, neither is Article 4 of Schedule A. It is the practice, not the meaning of the articles, that is significant in the context of these proceedings.

6. As a result of an incident between Mr. Nelson and the grievor on February 12, 1987, the grievor was told not to report for work on February 13, 1987. When he attended at the respondent's premises on February 13, 1987 to hand in his time sheets for the previous week he was advised by Mr. Nelson, verbally and by letter dated February 12, 1987, that because of what had happened between them on February 12, 1987 and because of:

- Continual use of foul and abusive language.
- Complete disregard for your superiors.
- Continued disregard of instructions from your superiors, and company dispatchers.
- Disobeying your operators instructions.
- Failing to report to the job site as instructed.

- Disregard for the truth.
- Disrespect for your superiors

[sic]

he was being suspended for three weeks beginning February 16, 1987. In addition to the alleged culminating incident on February 12, 1987, the respondent relies on six other events to justify the discipline imposed.

7. The applicant admits that a letter dated October 16, 1986 constitutes a written warning issued to the grievor for failing to properly put away and secure company equipment. Because that written warning was not grieved, it is not now open to the grievor to attempt to explain away the misconduct that gave rise to it in these proceedings. Even if it was open to him to do so, we find the explanation that he gave to be unsatisfactory. This written warning constitutes a part of the grievor's disciplinary record.

8. The next three events upon which the respondent relies occurred on October 16, October 20 and November 6, 1986. In each case, the applicant admits that the grievor received instructions to travel to London with Mr. Monchalin that evening. In each case he failed to do so. Instead, he left Mr. Monchalin alone in London and drove home to Brantford for the night. In each case, he rejoined Mr. Monchalin the next morning in time to begin work. We accept Mr. Nelson's evidence that he had some discussions with the grievor with respect to these events. However, we are not satisfied that these discussions were intended to be disciplinary in nature or that it was clearly brought to the grievor's attention that his conduct on any of these three days was unacceptable to the respondent. Further, as we have already found, the respondent does not strictly and consistently require oilers and operators to travel or stay together, even if that is a requirement of Article 26.1(c)(iii). Consequently, we are not satisfied that any of these three events properly forms part of the grievor's disciplinary record and the respondent is not entitled to rely on any of them to justify the suspension imposed on February 12 and 13, 1987.

9. The fifth event upon which the respondent relies arises out of the grievor's return, two days late, from a vacation in December 1986. It is evident that the grievor had no intention of returning to work on time and made no effort to either obtain an extension of his leave or to advise the respondent that he would return late. Notwithstanding that the grievor was on his honeymoon during this vacation, his actions were irresponsible and deserving of discipline. However, the respondent did not, in our view, impose any discipline. Mr. Nelson testified that he had only a brief conversation with the grievor in which he only asked Mr. Millar why he hadn't telephoned the company to indicate that he would not be returning on time and then, in his words, "I let it go, I was sympathetic, it was his honeymoon". Not having disciplined the grievor in a timely manner or at all, this event cannot form a part of his disciplinary record and the respondent is not entitled to rely on it to justify the suspension which is the subject of these proceedings.

10. Sixth, a letter dated January 20, 1987 constitutes a written warning to the grievor for failing to call the office from the job site to report on the progress of the job as he had been instructed to do and for subsequently using foul language to a dispatcher. As will become evident, it is significant that this warning letter specifically warns that:

The foul language and your attitude in response to questions will not be tolerated in the future.
If there were to be [sic] a second occurrence of the above, you will be disciplined accordingly.

The warning letter was not grieved and accordingly it is not open to the grievor to try to explain

away the misconduct that gave rise to it in the context of this proceeding. Consequently, we do not take into account the grievor's explanation in that regard.

11. Finally, on February 12, 1987, Mr. Monchalin and the grievor were instructed to move the crane from a job site in Bowmanville to one in Rothsay. The grievor, through Mr. Monchalin, was also instructed to take the support truck to the respondent's yard in Brantford where he was to unload the swing-a-way sections and load the rigging required for the Rothsay job. The grievor did that but, rather than driving to Rothsay that night, he stayed at home in Brantford, intending to join Mr. Monchalin in Rothsay the next morning. Mr. Nelson learned of the grievor's intentions and asked him about it. Mr. Nelson accepted the grievor's explanation that Mr. Monchalin had agreed to such an arrangement and was prepared to leave it at that. Subsequently, however, Mr. Monchalin telephoned Mr. Nelson and complained that the grievor had refused to accompany him to Rothsay or to stay there overnight with him. Mr. Nelson then telephoned the grievor at home and confronted him with Mr. Monchalin's complaint. In the course of their conversation, the grievor became agitated. He said that Mr. Monchalin was lying, directed abusive and obscene language to Mr. Nelson, and then hung up the telephone. Mr. Nelson telephoned back and advised the grievor that because of his abusive and obscene language to him, he should not report for work the next day. The grievor directed another obscenity at Mr. Nelson and again hung up. A short time (5-20 minutes) later, the grievor telephoned Mr. Nelson and again abused him with obscenities. Recognizing that it would be futile to try to talk to the grievor at that time, Mr. Nelson hung up the telephone. The next morning the grievor went to the respondent's premises in Brantford to hand in his time sheets. While there, he met with Mr. Nelson and was advised, verbally and by the letter dated February 12, 1987, of the suspension that is the subject of these proceedings.

12. Both parties agree that the grievor should be disciplined and that he needs to be sent a message. Counsel for the respondent argues that the grievor's disciplinary record and culminating incident fully justify the suspension given to the grievor and is necessary to send that message. Counsel for the applicant argues, and we agree, that the grievor's disciplinary record really consists of only two warning letters. He agrees, as does the grievor (though grudgingly), that the grievor's behaviour in the course of the telephone conversations with Mr. Nelson was misconduct that justified discipline, but, he submits, the grievor felt "picked on" and that when he was called at home with respect to a situation in which he thought he had acted in a manner acceptable to the company he acted uncharacteristically and out of anger. Counsel argues that this mitigates the grievor's conduct and, considering the two warning letters, justifies only a two to five day suspension.

13. Article 4.1 of the collective agreement provides that:

ARTICLE 4 - MANAGEMENT RIGHTS

4.1 The Union agrees and acknowledges that the Employer has the exclusive right to manage the business and to exercise such right without restriction, save and except such prerogatives of management as may be specifically modified by the terms and conditions of this Agreement.

Without restricting the generality of the foregoing paragraph, it is the exclusive function of the Employer:

- (a) To determine qualifications, classify, transfer, hire, direct, promote, demote, lay-off, *discipline and discharge employees for just cause* and to increase and decrease working forces in accordance with the terms of this Agreement.
- (b) To determine the materials to be used, design of the products to be handled, facilities and equipment required, scheduling of work and locations of equipment.

- (c) To determine the rules and regulations to be observed by employees, violations of which may be the cause for discipline and may include discharge.

[emphasis added]

Section 124(3) of the *Labour Relations Act* makes section 44(9) of the Act applicable to these proceedings. Section 44(9) provides that:

Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

There was no suggestion that the collective agreement precludes the Board from exercising its discretion under section 44(9) of the Act to substitute another penalty for the suspension given to the grievor if it sees fit to do so.

14. The difficulty that arbitrators face when reviewing the discipline imposed by an employer, and the uncertainty that results, is illustrated by the penalties imposed in the "abusive or insubordinate language" cases cited to the Board in this case. In *Canadian Westinghouse Co. Ltd.*, (1966) 17 L.A.C. 427 (Palmer), an employee grieved the imposition of a three day suspension for requesting in obscene terms, that a foreman "perform a physically impossible sexual act". This grievance was dismissed. In *Gardner-Denver Co. (Canada) Ltd.*, (1974) 6 L.A.C. (2d) 280 (Betcherman), the arbitrator substituted a five day suspension for the discharge of an employee who has used obscene language to a foreman. In *Toga Manufacturing Ltd.*, (1974) 6 L.A.C. (2d) 318 (Curtis), the arbitrator found that a long term employee who had verbally abused the foreman should not have been discharged and substituted what was effectively a suspension of approximately two and a half months. In *Canadian Lukens Ltd.*, (1976) 12 L.A.C. (2d) 439 (Schiff), the arbitrator ruled that a grievor with a disciplinary record consisting of a written warning and a five day suspension who had used obscene language in a confrontation with a foreman had been properly discharged. In *St. Lawrence Foods Limited*, (1983) 9 L.A.C. (3rd) 187 (Springate), the majority of the Board of arbitration found that the imposition of a written warning for the use of obscene language to a fellow employee was justified notwithstanding that there were mitigating circumstances (including an apology). Finally in *Fruehauf Canada Inc. (Dixie Plant)* (unreported decision dated November 28, 1986, (Brunner)) an employee of thirty-four years seniority and having a disciplinary record consisting of two written warnings and a one day suspension, who used abusive and obscene language and made verbal threats to a supervisor, albeit as a result of a flare up of temper, had a five day suspension substituted for the 18 day suspension imposed by the employer. Of course, all of these decisions arise out of the particular facts relating to the grievance being arbitrated. However, they do serve to illustrate that there is wide range of disciplinary responses to misconduct such as that which occurred in this case that can be considered to be just and reasonable.

15. Because the applicant admits that the conduct of the grievor merited some discipline, the issue before the Board is whether or not, in the circumstances of this case, it is appropriate for the Board to exercise its discretion under section 44(9) of the Act to substitute some other penalty for the suspension imposed by the respondent. The scope of arbitral review of disciplinary penalties pursuant to section 44(9) requires an assessment of what penalty is just and reasonable in the circumstances. In our view, the broad review advocated in arbitral decisions such as *Phillips Cables Limited* (1974), 6 LAC (2d) 35 (Adams), which may be justifiable in cases involving severe discipline, such as discharge, is not generally warranted in cases involving lesser forms of discipline so long as the discipline imposed is, in all the relevant circumstances, within the range of penalties

that is just and reasonable. Because the determination of what discipline is appropriate for any particular misconduct is not an exact science, it is not productive to engage in arbitral second-guessing in such cases. Such second-guessing tends to create uncertainty in disciplinary matters and invites challenges to disciplinary penalties which, though reasonable, may not be identical to that which a second-guessing arbitrator might select.

16. In our view, so long as an employer considers only relevant factors to impose discipline that is just and reasonable in the circumstances, particularly where the discipline imposed is not especially severe, it should not be interfered with by an arbitrator. In that regard we agree with the views expressed in *Labatt's Ontario Breweries Ltd.* (unreported decision dated April 22, 1986, (Freedman)) and in *Rolland Inc.*, (1983) 12 L.A.C. (3d) 391 (MacDowell) where, at pp. 401-402, the majority decision explains that:

In all of the circumstances, we are not inclined to interfere with the penalty which the employer has chosen. As a general rule, we do not believe that it is desirable for a board of arbitration to attempt to "fine tune" a managerial decision respecting discipline which is not in itself unreasonable or excessive. To do otherwise would merely encourage costly litigation as grievors, hoping for perhaps minor gains (whatever the over-all cost) press their bargaining agents to carry every discipline matter forward to arbitration. Likewise, employers might be encouraged to impose more extreme sanctions at the outset, on the expectation that an arbitrator inclined to tinker might be disposed to "split the difference" and substitute something within the general realm that management might otherwise have chosen in the first place. It is one thing for a union and employer, in the grievance procedure, to haggle about the penalty, "saw it off", "split the difference", or bargain a concession in anticipation of future considerations. It is quite another for an arbitrator to hold, on the basis of objective evidence and reasoned consideration, that an employer's disciplinary response is unwarranted and should be modified. This is not to say that arbitrators should shrink from modifying a penalty which is clearly inappropriate in the circumstances or excessive when measured against the norms of the industrial community. But this requires more than some "gut feeling" or vague impression that the arbitrator, standing in the shoes of management, might have done something somewhat different - not least because the litigation process provides, at best, only an imperfect appreciation of the enterprise as a whole and the human and business relationships which must somehow be fitted into a legal mold.

Accordingly, while a three-week suspension may not be the penalty which this board of arbitration would have chosen, we are satisfied that it is clearly within the range of reasonable employer responses to the facts at hand. There is some arbitral authority to suggest that a more serious sanction might be sustained while, on the other hand, one could plausibly argue that a one-week or two-week suspension might be sufficient to impress upon the grievor that he must acknowledge his supervisors' authority or find work elsewhere. We decline to engage in such largely subjective speculation. In our view, in all the circumstances, the penalty imposed is not one with which we are inclined to interfere.

17. The grievor in this case has six years seniority as an employee of the respondent. His disciplinary record prior to the suspension grieved herein is of recent origin and consists of two written warnings. The respondent was not entitled to base any part of its assessment of what discipline was appropriate on anything other than these written warnings and the culminating incident. The second written warning, with respect to events that occurred only one month prior to the events that gave rise to the grievance before us, dealt with both a failure to carry out instructions and the use of foul language, and specifically warns that another occurrence thereof will result in further discipline. The grievor's abusive and insubordinate language when speaking to the respondent's general manager on February 12, 1987 cannot be characterized as "shop talk" and his conduct was not, in our view, the result of a momentary flare up. Nor does the grudging admission of misconduct assist him, particularly when he admits that he would repeat the offence if he felt that a supervisor was "wrong". The applicant admits that the grievor's conduct in the course of his telephone conversation with Mr. Nelson on February 12, 1987, cannot be condoned and is deserving of

up to a five day suspension. That, in our view, is an understatement. The manner in which the grievor dealt with Mr. Nelson was, under all the circumstances, nothing less than insolent and insubordinate.

18. Had the respondent been entitled to rely upon all of the events upon which it sought to rely, its disciplinary response would, in our view, fall within the range of just and reasonable penalties and we would not interfere with it. We have found, however, that the respondent was not entitled to rely upon all of those events and, accordingly, its assessment of what discipline was appropriate was based in part on irrelevant factors. Having regard to all of the circumstances, including the respondent's own disciplinary response (which suggests that a lesser penalty would have been imposed if only relevant factors had been considered), the admissions of the applicant, the grievor's disciplinary record of 2 written warnings, and his misconduct on February 12, 1987, we find that a ten day suspension is an appropriate penalty. We therefore direct the respondent to substitute a ten day suspension for the suspension it imposed. The respondent is further directed to amend its records accordingly and to compensate the grievor for all lost wages and benefits for those days for which we have found he was not properly suspended. Any earnings from employment received during those days are to be deducted from the compensation to be paid to the grievor. We shall remain seized on the issue of compensation in the event that the parties are unable to agree on the amount to be paid to the grievor.

2410-85-U International Beverage Dispensers and Bartenders Union, Local 280, Complainant v. The Holiday (A Partnership), Holiday Entertainment Inc. (General Partner), Formerly Harvey Weisfeld and Alan Charney, C.O.B. as the New Holiday Tavern, Respondent

Remedies - Sale of a Business - Unfair Labour Practice - Employees of predecessor employer not hired by successor - Successor employer not obliged to continue the employment practices of the predecessor because collective agreement had expired at time of sale - No refusal by respondent to enter into an employment relationship with grievors because no evidence adduced that application made or others hired - Knowledge by respondent that unidentified persons wanted to work for it not sufficient to prove breach of Act - Complaint dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *F. W. Murray* and *R. Wilson*.

APPEARANCES: *Beth Symes* and *James Jackson* for the complainant; no one appearing for the respondent.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER F. W. MURRAY; May 1, 1987

1. This is a complaint filed under section 89 of the *Labour Relations Act* ("the Act"). The complainant trade union ("the union") alleges that the respondent's "refusal to employ members of the Union" constituted a breach of section 66 and other sections of the *Labour Relations Act*. After this complaint was filed, the respondent declared bankruptcy. No one attended on its behalf at the hearing of the complaint. Its failure to do so did not relieve the Board of its obligation to consider whether there is a proper, legal basis for granting the relief sought by the complainant.

Having carefully considered the complainant's evidence and argument, we have concluded that the complaint must fail.

2. The union was party to a collective agreement with 491657 Ontario Ltd. ("the original employer") covering its usual unit of persons employed in bartender, beverage waiter and related job classifications at a tavern it operated at 651 Queen Street West, Toronto, under the name "Holiday Tavern." On April 29, 1985, the original employer sold the land, building and equipment employed in the business of the Holiday Tavern to 651 Queen W. Investments Ltd. On May 17, 1985, 651 Queen W. Investments Ltd. leased those assets to Harvey Weisfeld and Alan Charney, in trust for a corporation to be incorporated.

3. These transactions became the subject of proceedings initiated by the union under section 63 of the Act, alleging that each transaction constituted a sale of business within the meaning of that section and requesting a declaration to that effect and to the effect that the purchaser in the first transaction and the lessees in the second were bound by the terms of the collective agreement between the union and the original employer. Those proceedings were defended, at first. Messrs. Weisfeld and Charney, having renovated the premises and opened a tavern/restaurant therein under the name "New Holiday Tavern", denied that section 63 applied and, in the alternative, applied for a declaration under subsection 63(5) of the Act terminating any rights the union might have required with respect to employees in their business. Those proceedings were heard by this panel on two days in October and adjourned for continued hearing on further dates in January 1986. Evidence given in the October hearings indicated that the respondent was the organization through which Messrs. Charney and Weisfeld had arranged to carry on the business of the new Holiday Tavern in or shortly after July 1985, when it opened for business.

4. This complaint was filed in December 1985. Notice of it was given to the respondent by mail addressed to it in care of the solicitors of record for Messrs. Weisfeld and Charney in the outstanding sale of business proceedings. That initial notice indicated that the complaint would be heard on the continued hearing dates already scheduled in the sale of business proceedings. Shortly thereafter, all parties agreed to adjourn both proceedings pending completion of settlement discussions. Those discussions were not ultimately fruitful and, at the complainant's request, this complaint and the sale of business application were relisted for hearing April 30, 1986, and the parties were notified accordingly. Thereafter, the Board was advised that the respondent had made an assignment in bankruptcy. The Board then gave the trustee in bankruptcy notice of both outstanding proceedings and the pending hearing dates therein. The trustee responded with a standard form letter addressed to the Board, in which it said:

We understand that you have instituted an action against the bankrupt and for that reason we wish to refer you to Section 49 of the *Bankruptcy Act* ...

which the letter proceeded to quote. Of course, the Board had not instituted an action against the bankrupt and, in the Board's view, its proceedings in this matter do not fall within the ambit of section 49 of the *Bankruptcy Act*: see *Chandelle Fashions Ltd.*, [1981] OLRB Rep. Sept. 1191.

5. None of the respondents to this and the sale of business application attended at the Board's hearing of April 30, 1986. Counsel for the union expressed some surprise that no-one had attended on behalf of Messrs. Charney and Weisfeld, as Mr. Charney's testimony had not been completed when the hearings of the sale of business application adjourned in October 1985 and their obligations under subsection 63(13) of the Act had not, therefore, been discharged. Nevertheless, counsel for the union chose not to have the proceedings adjourned so that their attendance could be compelled. Instead, she elected to present the union's case with respect to both the sale of business application and this complaint.

6. The union's complaint contains the following allegations:

1. The Grievors were employees of the predecessor employer, 491657 Ontario Limited, carrying on business as The Holiday Tavern, who have been refused employment by the successor employer, the Respondent, in this Application and one of the Respondents in the Section 63 Application, Board File No. 0289-85-R.
2. On or about July 2, 1985, Thelma Herman, one of the Grievors was told that no applications were being taken by the Respondent, when in fact the Respondent was in the process of hiring for its new business.
3. None of the Grievors, all of whom were available for and whom the Respondent knew wanted work with them, were given work at any time from its commencement of business until the present.
4. In another period of hiring in late October and November, 1985, Linda Bratby, Myra Sullivan and Alan O'Leary all once again indicated their interest in working for the Respondent. Although the Respondent indicated that they would get back to these employees, they have not as yet heard back from them, and no offer of employment has been made. Thelma Herman, who was ill at the time, was not contacted for employment, although the employer knew she wanted to work at The Holiday Tavern.
5. During both the periods of hiring mentioned above, the Respondent has fully staffed its operation, including positions of waiting tables and attending bar, which were the jobs of the Grievors previously.
6. The refusal to employ members of the Union, while employing other people in the same jobs, amounts to a lock-out, and a breach of Section 3, 66, 70 and 72.

The relief claimed in the complaint originally included an order that the respondent post a notice in the usual form and "reinstate the grievors to their former positions" with compensation for lost wages, gratuities and other benefits. In view of the closure of the New Holiday Tavern and the respondent's subsequent assignment in bankruptcy, counsel for the complainant advised the Board that it would not pursue its claim for posting and reinstatement remedies, and would limit the compensation claims to the period during which it understood the New Holiday Tavern had been in operation: mid July 1985 to the end of January 1986.

7. The Board's usual practice in section 89 complaints is to deal at first instance only with the question of the respondent's liability to pay compensation; if the Board finds that there is such liability, it retains jurisdiction to deal with the quantum of compensation at a later date if the parties are unable to resolve that issue. In this case, however, counsel for the complainant expressly elected to address both liability and quantum in the evidence and argument presented at hearing on April 30, 1986.

8. Myra Sullivan and Linda Bratby were actively employed by the original employer when the sale to 651 Queen W. Investments Ltd. took place. Lisa Bajor was one of the owners of the original employer, 491657 Ontario Ltd. In the evening of April 27th, she told Myra Sullivan and Linda Bratby that they were in the process of selling the business, but were not sure whether the transaction would close as scheduled the following Monday. Whether it did or not, she said, the business would be closed on that Monday, and would re-open on Tuesday under either the new owners or the old ones. Sullivan and Bratby arrived at the Holiday Tavern early that Monday afternoon. The sale did close, and Mr. Title, a principal of the purchaser, arrived shortly thereafter. He is quoted as saying "what the hell is everybody doing here - I bought an empty building", or words to that effect. One of the union's business agents arrived on the scene at some point, and Ms. Bajor introduced him to Mr. Title. Sullivan and Bratby heard Mr. Title tell the business agent

to contact him at his office. The grievors repeatedly asked Mr. Title whether they had a job. Title avoided these questions initially, and then finally said "I don't know." The grievors recall seeing two people over by the wall of the room in which these conversations were taking place. They now identify those two people as Messrs. Charney and Weisfeld. There is no suggestion that either of them participated in or could even overhear these conversations as they took place.

9. Counsel for the complainant testified about her telephone and written correspondence with representatives of 651 Queen W. Investments Ltd. and Messrs. Charney and Weisfeld. On April 30, 1985, she had spoken both to Elliot Title, the principal of 651 Queen W. Investments Ltd., and Mr. Sloan, its solicitor. From them she learned that the premises were closed for renovation and that the company was looking for a tenant. The company was aware of the original employer's collective agreement with the union. The implications of that agreement were discussed. One of the them was the right of employees to return to work. Sloan asked how many employees did want to exercise that right. That question was answered in union counsel's letter of May 3, 1985 to Mr. Sloan. The application of section 63 of the Act and the employment of the grievors are dealt with in the following paragraphs of that letter:

As of the date of sale, April 29, 1985, there was a Collective Agreement in place between International Beverage Dispensers and Bartenders Union, Local 280 and the Holiday Tavern. Pursuant to Section 63 of the Labour Relations Act, my client is taking the position that 651 Queen W. Investments Ltd. is bound by this Collective Agreement.

The Holiday Tavern and the Union were in conciliation with respect to a new Collective Agreement. My client will give you Notice to Bargain pursuant to Section 63(3) of the Labour Relations Act, we would suggest that the conciliation process continue.

In our telephone conversation you asked me how many employees wish to be reemployed. We have reviewed the matter with our members and there are four (4) employees who were employed on April 29, 1985 and wish to be continued in their work plus Alan O'Leary who had grieved his discharge of July 5, 1984 and was ordered to be reinstated by an Arbitrator in an awarded [sic] dated August 29, 1984. You advised that you were aware that was [sic] an application for Judicial Review pending before the Divisional Court of this award and that if that application were denied, Mr. O'Leary would be reinstated to the employment of 651 Queen W. Investments Ltd.

Because of your uncertainty with respect to the Labour Relations matter in this file, my client has instructed me to file an application under Section 63 of the *Labour Relations Act* to determine the respective rights of the parties. I enclose a copy of that application for your information.

10. In May, Mr. Title contacted counsel for the union, told her that the premises had been leased to Weisfeld and Charney and gave her the name of their lawyer. She spoke to that lawyer on May 28, 1985. He gave her further information about the lease transaction and his client's intention to open an "entertainment club." He asked for a copy of the collective agreement. Counsel for the union advised him that former employees of the original employer wanted jobs in the new business and she took the position that the lessees were to take those employees back. This conversation is referred to in a letter from union counsel to the lessee's lawyer dated May 29, 1985, which made extensive reference to section 63 and enclosed a copy of the collective agreement. The only reference to employment of the grievors appears near the end of the letter:

The Union looks forward to dealing with the new owners and to try to resolve the outstanding matters. As I advised you, the Union had grieved the discharge of an employee who was fired in July of 1984. An arbitrator upheld that grievance and reinstated that employee to his job as waiter with full compensation. The Holiday Tavern chose to make an application to the Divisional Court for Judicial Review of that decision. The Judicial Review has been perfected, factums have been filed, and we are awaiting a date for hearing before the Divisional Court.

Should the arbitration award be upheld, your clients, as successor employers, would be bound to reinstate the grievor and to pay him compensation which includes wages, benefits and gratuities.

11. Grievor Thelma Herman did not testify. There was no evidence with respect to the conversation alleged in paragraph 2 of the complaint and, thus, no evidence that the conversation was with someone with actual or ostensible authority to speak or act on behalf of the respondent.

12. In late October or early November, after the first two days of hearing of the section 63 application, grievors Sullivan, Bratby and O'Leary each attended (on separate occasions) at the New Holiday Tavern and applied for work there. Each of them was interviewed by Mr. Charney. Charney and the three grievors had all been in attendance and seen one another at the Board's hearings in section 63 application. Each grievor's prior employment at the original employer's Holiday Tavern was discussed during his or her interview with Charney. At the end of each interview, Charney told the grievor being interviewed that he would get back to him or her when a job came up. There is no evidence that Mr. Charney told any of the grievors that there was any position available at the time of these interviews, nor was there any evidence that the respondent hired anyone at or after that point in time. None of the grievors testified to any discussion with Charney about the hourly rates paid to or hours worked by the respondent's employees at the time of the interviews, or the number of persons employed by the respondent at that time. There is no evidence before us with respect to those matters. Each of the grievors had made more than one visit to the New Holiday Tavern in connection with arranging and participating in these interviews. On those occasions, the grievors observed that liquor and food were being served, although not in great quantity (which would not have been surprising, having regard to the time of day at which these attendances occurred). Apart from the inference which could be drawn from those observations, there was no evidence that the respondent had employees at all.

13. As we have noted earlier, counsel for the union expressly elected to deal in evidence with the quantum of losses suffered by the grievors as a result of the respondent's alleged violations of the Act. She advised the Board that no compensation was sought on behalf of Mr. O'Leary, for reasons which had to do with the still outstanding matter of the arbitration of his discharge by the original employer. No evidence was led with respect to Thelma Herman's losses. Linda Bratby and Myra Sullivan both identified the wage rate they had received and hours they had worked for the original employer, as well as the amount of gratuities they ordinarily received from customers while employed by the original employer. They also testified about their attempts to obtain alternate employment and the amounts they had earned at alternate employment during the period for which compensation was sought.

14. It was the union's position that there had been "a sale of business" within the meaning of section 63 of the Act from the original employer to 651 Queen W. Investments Ltd. and a further such sale of business from 651 Queen W. Investments Ltd. to the respondent. We found that to be so in our decision of May 23, 1986 in Board File 0289-85-R. The collective agreement between the union and the original employer was in effect on April 29, 1985, when the first sale took place. By its terms, however, the collective agreement in question was to expire on April 30, 1985, if timely notice to bargain were given prior to that date. Such notice had been given before either sale occurred. As a result, that collective agreement had expired by May 17, 1985, when the second sale occurred.

15. Subject to the provisions of other subsections not relevant here, subsections (2) and (3) of section 63 of the Act prescribe the labour relations consequences of a sale of business:

(2) Where an employer who is bound or is a party to a collective agreement with a trade union

... sells his business, the person to whom the business has been sold is ... bound by the collective agreement as if he had been a party thereto ...

(3) Where an employer on behalf of whose employees a trade union ... has been certified as bargaining agent or has grieved is entitled to give notice under section 14 or 53, sells his business, the trade union ... continues ... to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union ... is entitled to give to the person to whom the business was sold a written notice of its desire to bargain ...

Subsection (2) applies only to a sale of business which occurs during the term of a collective agreement. This Board has interpreted the language of that subsection to mean that, in those circumstances, the successor employer steps into the shoes of his predecessor for all purposes. The union and employees retain as against the successor all the rights they had as against the predecessor under the collective agreement, including any seniority rights, rights to continued employment or rights to recall from layoff: see *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861; *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060 and *Daynes Health Care Limited*, [1984] OLRB Rep. Aug. 1091.

16. On the other hand, if there is no subsisting collective agreement at the time of sale then, even though the predecessor may have been obliged by section 79 of the Act to continue to observe the terms and conditions of employment which had been applied during the currency of the collective agreement, the successor employer is *not* put in the shoes of the predecessor for all purposes. Subsection 63(3) preserves only the trade union's right to act as exclusive bargaining agent for persons employed by the successor in "the like bargaining unit in that business." The successor is not obliged to continue the employment or employment practices of his predecessor, but only to engage in collective bargaining with the trade union after being given the notice to bargain contemplated by subsection (3): *Re 380611 Ontario Ltd. (Colonial Tavern)* (1979), 23 L.A.C. (2d) 150 (Adams); *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786; *Davidson-Walker Funeral Homes*, [1981] OLRB Rep. Oct. 1359; and, *Winchester Press*, [1982] OLRB Rep. Feb. 284. As the majority observed in their award in *380611 Ontario Ltd. (Colonial Tavern)*, *supra*, at pages 155-156:

... s.55(3) continues the bargaining rights of a trade union, but not the employment relationships existing between the vendor and its employees. Section 55(3) is quite clear in stipulating the trade union, in facts similar to those at bar, continues to be the bargaining agent "for the employees of the person to whom the business was sold". This wording is quite unlike that of s. 55(2) which binds the person to whom a business is sold to any existing collective agreement "as if he had been a party thereto". These strong words convey a clear legislative intention to depart from the common law dictates of privity of contract and thereby impose a contract of sorts on a third party who was never a party to such an agreement. It is our opinion that had the Legislature intended to carry over the individual contracts of employment to the purchaser of a business, when no collective agreement from which individual rights are derived is in operation, wording similar to that found in s. 55(2) would have been resorted to.

17. As the transaction between 651 Queen W. Investments Ltd. and the respondent was one to which subsection (3) of section 63 applied, the grievors' rights to employment in the sold business were not preserved. The respondent was under no legal obligation to employ them in any jobs which could be described as "the same jobs" they had performed for the original employer, or any other jobs. It could deal with any question of their employment as it wished, subject only to the unfair labour practice sections of the *Labour Relations Act* and to the results of any collective bargaining which might follow the giving of the notice to bargain contemplated by section 63(3) of the *Labour Relations Act*. Although nothing particular turns on it, we note that, as of April 30, 1986, the applicant had no record of having given a notice to bargain to the respondent.

18. The union alleges breach by the respondent of four sections of the Act: sections 3, 66, 70 and 72. Section 3 does not itself create a substantive offence or unfair labour practice capable of being remedied under section 89 of the Act (see *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219 and cases cited in paragraph 6 thereof). Specific conduct contrary to either section 70 or section 72 was neither alleged nor proven.

19. The relevant portion of section 66 provides:

66. No employer, employers' organization of person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term of condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

It cannot be said that a respondent has "refused to employ or to continue to employ" a grievor unless the grievor had applied for employment by, or was an employee of, the respondent at the time the alleged unfair labour practice is committed. From the use of such terms as "reinstate" in the forming of the complaint and from some of the submissions of counsel in the early stages of the April 30th hearing, it appears that the union approached this complaint as though it involved a refusal to continue employment to which the grievors were entitled by operation of law. As we have noted, the grievors were not entitled to employment by the respondent, because the sale to the respondent fell under subsection 63(3) and not under subsection 63(2). Had it fallen under subsection 63(2), there would have been a right to employment, and the evidence presented to us would have been an adequate basis on which to grant the compensation sought. As the sale did not fall under subsection 63(2), the threshold question was not whether the respondent had refused to continue an employment relationship with the grievors but whether it had refused to enter into one.

20. There can be no "refusal" by an employer to enter into an employment relationship with a grievor unless the grievor has applied for employment. The grievors themselves did not apply to the respondent for employment until late October or early November 1985.

21. With respect to the grievors' non-employment by the respondent in the summer of 1985, counsel for the complainant argues that the requisite applications for employment are to be found in the discussions with Mr. Title of April 29, 1985, and the written and telephone correspondence referred to in paragraphs 9 and 10 of this decision. She argues that communications with Mr. Title on behalf of 651 Queen W. Investments Ltd. are matters of which the respondent is deemed to have notice because the lease to Charney and Weisfeld provided that until the liquor licences transferred from the employer to 651 Queen W. Investments Ltd. were further transferred to them, they would operate the tavern business "as the Landlord's Bar Manager", but for their own account. In an imaginative reversal of the ordinary rule, counsel argues that notice to or knowledge of Mr. Title is constructive notice to or knowledge of his corporation's agents, Messrs. Charney and Weisfeld, and, hence, is notice to or knowledge of the respondent corporation of which Charney and Weisfeld are principals. Even if the knowledge to be ascribed to Charney and Weisfeld was knowledge Title acquired after their fictive agency began, we are unaware of any legal principle by which that knowledge could be ascribed to them except by proof that they were actually aware of it. Even taking into account the evidence that Charney and Weisfeld were on the sidelines on April 29, 1985, we can find no such evidence.

22. Thus, any application to the respondent for employment in the summer of 1985 must be found, if at all, in communications with persons clearly acting on behalf of the respondent. The

only such communications are the telephone and written communication between union counsel and the respondent's solicitor in May 1985. The union's message in those communications was clearly that certain persons had the right to employment, not that they wished to apply for employment. We find it hard to characterize these communications as applications for employment in the ordinary sense. In any event, there is another aspect of these communications which makes it impossible to characterize them as applications for employment: the persons alleged to desire employment were never identified to the respondent's solicitor by name. While we accept the proposition that a trade union may act as the agent of its member in soliciting offers of employment or making applications for employment, the mere fact that an employer invites no further information upon being told by a union representative that "we have members who would like to work for you" is surely not a violation of the *Labour Relations Act*, whatever the motivation may be for not pursuing the conversation. The applicant for employment must at least be named in a union agent's conversation with a potential employer before that conversation can be characterized as an application for employment. Accordingly, this complaint does not disclose a violation of section 66 at any point in time prior to the grievors' actual applications for employment in October of 1985.

23. Turning to those applications, the evidence establishes that Linda Bratby, Myra Sullivan and Alan O'Leary applied to the respondent for employment and were not thereafter employed by the respondent. There is no evidence that the respondent was considering hiring anyone when these applications were made, nor that the respondent hired anyone then or at any time thereafter. Putting aside for a moment the question whether there has been a violation of section 66(a), there can be no award of compensation to any grievor if there is no evidence of loss. As the grievors had no legal right to continued employment in the sold business, the question is not what the grievors would have earned had they remained employed in the sold business. The question is: what they would have earned at whatever employment was available with the respondent at the time? We need to know how long each of the two complainants for compensation would have worked, and at what rate of pay, had they been hired by the respondent following their interviews in October 1985. We have no evidence whatsoever that there was any position they could have performed which was open at or after that time. If there were ever such positions, there is no evidence of their duration. Some evidence with respect to the availability and duration of and remuneration for work opportunities with the respondent following the grievors' interviews could have been put before the Board by serving a summons on one of the respondents' principals requiring him to bring to the hearing all employment records of the respondent. However much subsection 89(5) might assist in finding a violation, it cannot assist in finding a resulting compensable loss. Subsection 89(5) does not cast on a respondent the obligation to demonstrate that a complainant or grievor has suffered no loss. The complainant must adduce evidence respecting the nature and extent of damages suffered if the Board is to make any order as to remedy, particularly in relation to compensation: see *Windsor Airline Limousine Services Ltd.*, [1980] OLRB Rep. Feb. 272 at paragraph 71.

24. Counsel chose to deal in one hearing with both compensation and liability. There is no evidence directed to those elements of damages which must be established in quantifying compensation for a refusal to employ when there is no existing right to employment. We cannot invent a basis for awarding compensation, and can award none with respect to the alleged refusals of employment of Sullivan and Bratby.

25. As we noted earlier, the union expressly withdrew its requests for an order that the grievors be "reinstated" and an order that the respondent post a notice to employees in the usual form. It withdrew those requests because it knew the respondent was bankrupt. There was, consequently, no present employment to restore and no psychological or pedagogical purpose to be

served by a notice about employee rights subscribed to by an entity not expected to engage in any further employment. For those same reasons, and assuming such a declaration could be made in these circumstances, it does not appear to us that any useful purpose would be served in these particular circumstances by a bare declaration that the respondent has violated the Act with respect to the non-employment of Sullivan, Bratby and O'Leary following their interviews in late October and early November, 1985. The scope of the principle which our colleague describes in his dissent might be the subject of debate, if only as a consequence of the subsequent abandonment by the Board of the screening process to which the Board made reference in paragraphs 29 to 32 of its decision in *I.C.B. Warehousing*, [1976] OLRB Rep Oct. 621. With great respect to our colleague, we think it unnecessary and undesirable to put the limits of that principle in issue in the circumstances of this case.

26. We have come to the same conclusions with respect to the claim in paragraph 4 of the complaint that, in late October and November 1985, Thelma Herman "was not contacted for employment, although the employer knew she wanted to work at the Holiday Tavern." As we have noted earlier, we have difficulty with the proposition that an employer should be put on the defensive by an allegation that it knew someone wanted to work for it, in the absence of an allegation that an application for employment had been made by that person or by someone expressly acting in that person's name. Our sensitivity to that problem is heightened by the contrast between paragraph 3 of the complaint and the evidence which emerged as to the respondents' knowledge of the identity of persons said to want to return to work. In any event, there is no evidence that Herman has suffered any loss in respect of which a remedy would be appropriate. Finally, and assuming we could do so, we see no reason to make a bare finding of a violation in the circumstances.

27. For these reasons, we dismiss this complaint.

DECISION OF BOARD MEMBER R. WILSON;

1. I dissent on the decision of my colleagues with regard to this application.

2. I think there are two distinct perspectives from which to examine this case. One perspective focuses on the collective bargaining relationship of the immediate parties. It could be argued that no useful purpose would be served in these particular circumstances by a bare declaration that the respondent has violated the Act. I believe the second perspective being one of principle must be considered as well.

3. Subsection 89(5) provides protection from covert employer interferences with fundamental individual and collective bargaining rights under the *Labour Relations Act*.

4. It focuses on any management behaviour which may be motivated by anti-union animus. It recognizes the ultimate weakness of many of the substantive protections against anti-union behaviour if the victims of such behaviour had to establish the state of mind of management decision-makers. It is important not to minimize the clear obligation of the respondent employer to come forward with an explanation for suspect behaviour. Even if a declaration can serve no useful purpose in the relationship before the immediate parties before the Board. A declaration *may* be desirable to reinforce the principle of subsection 89(5).

5. I agree there can be no denial of employment before it as applied for and that there can be no breach of section 66 before Ms. Sullivan, Ms. Bratley and Mr. O'Leary made application to Mr. Charney in late October and early November 1985.

6. The time frame following late October and early November remains unresolved and

although I do not wish to suggest the union bore some formal onus to prove that there were in fact job openings or that the complainants believed there were job openings or that there was a real prospect of job openings in a declaration of breach of the Act. Evidence of this nature in this particular case, I believe would have assisted the Board in its deliberations.

7. Therefore, based on the evidence and circumstances of this case, I would have found a breach of section 66 of the *Labour Relations Act*, while agreeing with my colleagues that there can be no award of compensation.

1721-85-R Labourers' International Union of North America, Local 183, Applicant v. Olympia & York Developments Limited, c.o.b. as **Olympia Floor & Wall Tile Company**, Respondent v. Group of Employees, Objectors

Certification - Membership Evidence - Practice and Procedure - Witness - Two non-pay allegations made by respondent - Credibility of collector in issue - Evidence concerning criminal convictions of two witnesses admissible - Collector not in charge of organizing campaign found to have collected two cards without proper payment - All evidence secured by that collector rejected - Lack of credibility of another witness not destroying evidentiary value of membership he collected

BEFORE: R. A. Furness, Vice-Chair, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: L. A. Richmond, M. O'Brien, D. Chiasson and M. Toppan for the applicant; J. C. Murray for the respondent; Peter M. Whalen, Joseph Sapirman and Misha Prokepets for the objectors.

DECISION OF R. A. FURNESS, VICE-CHAIR, AND BOARD MEMBER F. W. MURRAY; May 6, 1987

1. The name: "Olympia Floor & Wall Tile Co." appearing in the style of cause of this application as the name of the respondent is amended to read: "Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Company".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The Board further finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical staff and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. After entertaining the representations of the parties, the Board ruled that it would not consolidate the instant application for certification in Board File No. 1721-85-R with the unfair labour practices in Board Files No. 1898-85-U, 1899-85-U, 1928-85-U and 2022-85-U at that time. The Board further ruled that it would hear the application for certification and would consider ini-

tially the issues raised with respect to the allegations of two non-pay which would be heard first. The Board further ruled that, with respect to the cross-examination of witnesses, the parties should take into account the fact that the issue before the Board was a very narrow one of the two non-pay at that time and that questions which might be asked in cross-examination should be restricted to that issue. The Board asked the parties to conduct themselves accordingly. The Board noted that if any dispute arose as to the propriety of questions in cross-examination, the Board would deal with such disputes at that time.

6. The respondent arranged for the attendance of a court reporter at the hearings. The Board permitted the presence of the court reporter and informed the respondent that in the event that a transcript was prepared the Board was entitled to copies free of charge and that the other parties should have access of the transcript at reasonable cost. This practice was agreed to by all the parties.

7. The respondent had informed the Board that Nick Bilias and Gary Lochhead had not paid the one dollar payment to the applicant when they signed applications for membership. The Board conducted its usual investigation upon being informed of the allegations of non-pay and scheduled the inquiry for hearing. The Board subpoenaed Mr. Bilias, Mr. Lochhead, Marino Toppan who prepared the Form 9, Declaration Concerning Membership Documents, and Michael Kevins, the employee of the respondent who allegedly did not collect a dollar from either Mr. Bilias or Mr. Lochhead when they signed applications for membership in the applicant. In the course of the investigation into the allegations of the two non-pays, the respondent called Michaelangelo De Rose as a witness.

8. During the course of the hearing, counsel for the respondent sought to ask questions regarding the criminal convictions of Mr. Kevins and Mr. De Rose. This line of questioning was objected to by counsel for the applicant. After entertaining the representations of the parties, the Board ruled that the witnesses were not parties within the meaning of section 8 of the *Statutory Powers Procedure Act* and that having regard to the provisions of section 23(1) of the *Evidence Act* of Ontario and to section 103(2)(c) of the *Labour Relations Act* and to the decision of the Ontario Court of Appeal in *Deep v. Wood* (1983) 143 D.L.R. (3d) 246, counsel for the respondent might ask the questions within the limitations set forth in section 23(1) and in *Deep v. Wood et al.*, *supra*.

9. The determination of whether Mr. Bilias and Mr. Lochhead each paid one dollar with respect to their applications of membership in the applicant involved assessing the credibility and the sharpness of the memories of the five witnesses. The credibility of the witnesses was fully explored by lengthy and searching cross-examination.

10. It was the evidence of Mr. Bilias that he signed an application for membership to join the applicant on October 9, 1985, when he was standing in the respondent's warehouse at the end of one of the aisles. He testified that he signed the application at around noon time and that on that occasion he did not pay a dollar to Mr. Kevins who had signed him up. Mr. Bilias testified that on that occasion Mr. Kevins told him not to worry about paying the dollar and added that someone would take care of it. Mr. Kevins also told Mr. Bilias to keep it to himself. Mr. Bilias had previously told Mr. Kevins that he did not have any money on him and was told by Mr. Kevins that he would get it later. It was the evidence of Mr. Bilias that at no time did he ever pay a dollar to Mr. Kevins with respect to the application to join the applicant.

11. Mr. Lochhead gave evidence that he signed an application for membership in the applicant on October 17, 1985, in a portion of the respondent's premises known as the new room. On that occasion, Mr. Lochhead stated that he signed the card in order to get rid of Mr. Kevins. He was asked for a dollar by Mr. Kevins. However, he did not give Mr. Kevins a dollar and was told

that he was not to worry about it and just say that he paid. On that occasion, Mr. Lochhead had money but was not prepared to pay one dollar to Mr. Kevins because, in Mr. Lochhead's opinion, Mr. Kevins was not doing his task in the right way. It was also the evidence of Mr. Lochhead that on that occasion Mr. Kevins did not indicate that he owed Mr. Lochhead any money.

12. The evidence of Mr. Biliias and Mr. Lochhead was given in a straightforward manner and they did not contradict themselves in the course of their examination and cross-examination. They appeared to the Board to have a good recall of the events in question and their evidence to the effect that they had not paid a dollar at any time to Mr. Kevins was not shaken on cross-examination.

13. The evidence of Mr. Kevins was that Mr. Biliias, in fact, paid him a dollar on the same day that Mr. Biliias signed the application for membership in the applicant and that Mr. Lochhead was owed five dollars by Mr. Kevins. It was the testimony of Mr. Kevins that when Mr. Lochhead did not offer to pay one dollar in cash to him with respect to the application for membership; he stated to Mr. Lochhead that, since he owed Mr. Lochhead five dollars on account of a purchase of marijuana, he would reduce the indebtedness to four dollars and pay the one dollar with respect to the card. Mr. Lochhead denied that he had ever had such a transaction dealing with marijuana with Mr. Kevins.

14. The evidence of Mr. Kevins contained a number of glaring inconsistencies. The Board will highlight the principal inconsistencies. Upon being questioned by counsel for the respondent about convictions for criminal offences, Mr. Kevins acknowledged such convictions and stated that all charges arose when he was between 16 and 18 years of age. At the time of the hearing Mr. Kevins was 26 and upon being confronted with specific dates admitted that the most recent criminal offence was four years ago when he was between 22 and 23 years of age. This was just one example of where Mr. Kevins would give one answer in response to the question only to give another when pressed on the issue before him. Another example occurred during cross-examination by counsel for the objectors. Mr. Kevins initially stated that he could not say at which time of the day Mr. Biliias signed the application for membership in the applicant. Subsequently, he stated that he signed the application for membership in the afternoon only to subsequently contradict himself and state that he signed it in the morning. It appeared to the Board that Mr. Kevins did not have a good recollection of the events relating to the allegations of non-pay and that he responded to questions so as to suggest that he knew the answers when it was clear that upon subsequent examination that he either did not know or was unsure of what had transpired. Mr. Kevins' poor recollection of the events is highlighted by the fact that he could not recall where Mr. Lochhead had signed the application for membership.

15. The evidence of Mr. De Rose was that Mr. Kevins was a friend and that he socialized with him from time to time and that they went to each others house where they viewed videos which had been rented. It was Mr. Kevins evidence, however, that he and Mr. De Rose were acquaintances rather than friends and had been out together only once. There was also a discrepancy in the evidence with respect to the alleged payment of one dollar by Mr. Biliias. It was the evidence of Mr. De Rose that he was twenty feet away when Mr. Biliias paid the money to Mr. Kevins and that by the time he approached Mr. Kevins, Mr. Biliias had left the scene of the transaction. Mr. Kevins, on the other hand, stated that Mr. De Rose was between eighteen inches and two feet away when the money was paid by Mr. Biliias to Mr. Kevins and that he got there at the same time the money was paid. While it was Mr. De Rose's evidence that he was in a hurry and told Mr. Kevins to save an intended conversation until later, Mr. Kevins stated that it was he who asked Mr. De Rose to wait with his intended conversation while he concluded his business with Mr. Biliias.

16. There were also differences in the evidence given by Mr. Kevins and Mr. De Rose with respect to alleged conversations between Mr. Lochhead and Mr. Biliias on the one hand and Mr. De Rose on the other. It was the evidence of Mr. Kevins that Mr. De Rose told him that after Mr. Biliias and Mr. Lochhead had testified before the Board they spoke to Mr. De Rose and told him why they had said the things they had said at the hearing about Mr. Kevins. When Mr. De Rose was questioned about this point, he denied speaking to Mr. Kevins about what Mr. Lochhead and Mr. Biliias had stated about their evidence before the Board.

17. There were further discrepancies also between the evidence of Mr. Kevins, on the one hand, and Mr. Toppan and Mr. De Rose, on the other. It was the evidence of Mr. Toppan that when he received the application for membership from the collectors, including Mr. Kevins, he asked if a dollar had been collected with respect to each application for membership as he went through the cards. This conduct of Mr. Toppan was supported by the evidence of Mr. De Rose who agreed that this in fact was the practice adopted by Mr. Toppan. It was Mr. Kevins' evidence that Mr. Toppan inquired of him about the one dollar payment for each application for membership in dealing with the cards in a group rather than looking at the applications for membership individually. However, upon being cross-examined by counsel for the applicant, Mr. Kevins changed his testimony and stated that Mr. Toppan went over each application for membership and asked if a dollar had been paid with respect to each one by the person who signed it. The Board also notes that Mr. De Rose in cross-examination by counsel for the respondent, initially denied that he had ever used an alias only to shortly thereafter admit that in fact he had used an alias.

18. In considering the evidence in its totality, the Board accepts the evidence of Mr. Biliias and Mr. Lochhead that they did not pay a dollar with respect to their applications for membership. On the other hand, the demeanour and the quality of the evidence given by Mr. Kevins suggests that quite apart from his extremely hostile attitude towards the management of the company and his anti-semitic outbursts when referring to the management and some of the employees of the respondent, had a very poor recall of the events in question and, as outlined earlier, displayed a tendency to vary his evidence upon being pressed on particular issues. The evidence of Mr. De Rose, which was no doubt offered as corroboration for the testimony of Mr. Kevins, did not succeed in the critical areas of the testimony in substantiating the key elements of Mr. Kevins' evidence. Mr. Kevins and Mr. De Rose disagreed upon the circumstances under which Mr. Biliias allegedly paid a dollar and they also disagreed and, indeed, even apparently tried to conceal the nature and extent of their friendship.

19. In assessing the evidence of Mr. Toppan, Mr. Kevins and Mr. De Rose, the Board is satisfied that Mr. Toppan in fact checked each application for membership and asked Mr. Kevins and Mr. De Rose, who was also a collector, whether or not a dollar had been paid with respect to each application for membership by the person who signed it. The Board finds that Mr. Toppan was an entirely credible witness and that he made the necessary inquiries with care and in good faith of Mr. Kevins. Having made the necessary inquiries, he completed the Form 9. The Board finds that Mr. Toppan completed the Form 9 based upon the best information available to him. No blame attaches to Mr. Toppan for the conduct of Mr. Kevins in not securing the one dollar payments from Mr. Biliias and Mr. Lochhead with respect to their applications for membership in the applicant.

20. Having assessed the demeanour and evidence of Mr. De Rose, the Board concludes that Mr. De Rose was not a credible witness. Mr. De Rose, as was stated earlier, sought initially to deny that he used an alias and it was only when pressed that he acknowledged this to be the fact. It was the position of the respondent that because of what was perceived to be the lack of credibility of Mr. De Rose that the Board should disregard the applications for membership collected by Mr.

De Rose. In the view of the Board, the fact that Mr. De Rose did not impress the Board as a credible witness does not have the effect of destroying the evidentiary value before the Board of the applications for membership which he collected since no inquiry was conducted and no allegation was made with respect to the applications for membership signed and collected by Mr. De Rose.

21. The question now arises as to what the Board should do with respect to the additional nineteen membership cards which Mr. Kevins signed on behalf of the applicant. As the Board stated in *Dough Delight Ltd.*, [1986] OLRB Rep. May 603, it is important to remember that the Board's object in any inquiry into undisclosed irregularities is not to punish non-disclosure but to determine what weight can be given to the impugned membership documents and, in the light of the non-disclosure, to the other membership documents filed with them and the supporting Form 9, Declaration Concerning Membership Documents, as evidence of membership. Counsel for the respondent and the objectors urged the Board to discount all of the cards which had been collected by Mr. Kevins. In *RCA Victor Company, Ltd.*, 53 CLLC ¶17,067, the Board stated at page 1469:

In dealing with the quality of the evidence submitted by a trade union in support of its claim to be certified, a number of situations may be distinguished and we propose to examine some of them without in any way suggesting that the examination is comprehensive and exhaustive. Some of the evidence submitted may be patently forged or fraudulent, i.e., cards or receipts may be submitted bearing signatures which are not those of the persons who purport to sign them or receipts may be submitted in respect of persons who have paid no money. Where it is established that even a single card or receipt submitted by an applicant union is affected by such vice, and the card or receipt is submitted with the knowledge of a responsible officer or official of the union, the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union.

In dealing with instances where there has been a flagrant and deliberate attempt by an applicant to evoke an effective scheme of conspiracy to defraud the Board, the Board has made a distinction in *Webster Air Equipment Company Ltd.*, 58 CLLC ¶18,110, where the Board stated at page 1718:

In dealing with this situation, the Board has made a distinction between two types of cases: (i) where the action impugned is that of a responsible officer or official of a union, and (ii) where the action is that of a supporter or canvasser on behalf of an applicant who occupies an inferior office or no office in the union. In so far as the first of these is concerned, the Board said in the *RCA Victor Company Case*, (1953) CCH Canadian Labour Law Reporter, Transfer Binder, ¶17,067, C.L.S. 76-412, that, even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, "the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union". Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the Board has taken the position that the card in respect of which the irregularity is established is disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members.

22. In the instant case, the two allegations of non-pay have been established to the satisfaction of the Board. Both of these non-pays resulted from the conduct of Mr. Kevins. When a collector who was not in charge of an organizing campaign is found to have collected even a single card without proper payment, the response of the Board as set forth in *Webster Air Equipment Company Ltd.*, *supra*, has been to consider that it depended upon the nature of the irregular conduct and the extent to which the objectionable practice was resorted to in signing up the members. For example, in *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. April 424, the Board disregarded all of the cards solicited by a collector who had told one applicant who signed a card for membership in a trade union not to worry about paying a dollar. Since the Board is forced to rely heavily upon the authenticity of evidence of membership which has been filed, the deliberate disregard of the legal requirements for membership in a trade union ought not to be lightly tolerated by

the Board. Where the irregularities have been innocent in nature, the Board has simply rejected the card which was involved. See, for example, *N. A. Constructions*, [1982] OLRB Rep. Jan. 77.

23. As the Board stated in *Frankel Steel Limited*, [1984] OLRB Rep. Jan. 28, the distinction between innocent error and deliberate misconduct is not always easy to make. The facts of this case clearly indicate that Mr. Kevins intensely disliked the management of the respondent and was prepared to go to the lengths he did go to in order to ensure the certification of the applicant. The evidence discloses deliberate misconduct by Mr. Kevins in that he told Mr. Biliias and Mr. Lochhead not to worry about paying the dollar. In the case of Mr. Biliias, he was told to keep the fact of non-payment to himself. Mr. Lochhead was told to say he paid it. It is hard to imagine a more deliberate attitude to not collecting the dollar payments. The credible evidence fails to disclose any real concern to collect the dollar payments.

24. In the context of all the evidence before the Board, we are not prepared to place any reliance upon the evidence of membership secured by Mr. Kevins given the deliberate nature of his conduct. In these circumstances, the evidence of membership in the form of the twenty-one cards collected by Mr. Kevins must be rejected by the Board.

25. The Registrar is directed to list this case for continuation of hearing.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I dissent.

2. The evidence in this case would suggest that Kevins was very unsophisticated and had little, if any, knowledge of the trade union movement, or the organizing of trade unions.

3. While some statements he made could be contradictory, it was the company who raised the issue of the two non-pay applications. With the company and the petitioners involved, looking for any avenue to defeat the organizational drive of Local 183 of the Labourers' union they could only raise the two incidents.

4. It is my opinion that if the Board rules that the two applicants did not make payment on the application cards in question, the balance of the application cards obtained by Kevins should not be disallowed.

2999-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada), Applicant v. Ontario Engineered Suspensions (Blenheim) Ltd., Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Respondent employer asking that pre-hearing representation vote be set aside because of the conduct of an employee supporter of the union in advising another employee that he was not eligible to vote - Employee eligible to vote but not voting - Reasonable diligence test to be applied to determine whether to entertain the employer's objection - Employee having adequate notice of vote - Employee's ability and opportunity to make inquiries concerning the Board's notices not interfered with - Board declining to direct new vote

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *I. M. Stamp* and *J. Redshaw*.

APPEARANCES: *L. N. Gottheil, Glen Myers, Gilles Desjardins, Real Desjardins, Doug Sales* and *Greg Van Gassen* for the applicant; *Brian P. Smeenk, George Lansens, Barbara Chapple, Dave Sykes* and *William Morrison* for the respondent.

DECISION OF THE BOARD; May 20, 1987

1. This is an application for certification in which a pre-hearing representation vote was conducted. Thirty-seven ballots were cast in favour of representation by the applicant trade union, thirty-six were against and one was spoiled. The respondent employer asks that these results be set aside and a new vote ordered because of the conduct of an employee supporter of the union in advising another employee that he was not eligible to vote. That employee was eligible to vote, but did not do so. Had he done so, the employer argues, the union might not have won the vote.

2. The employer's request was first made in its counsel's letter to the Board dated March 20, 1987. That letter is the only statement of desire to make representations which had been filed in this matter. It was received by the Board on March 24, 1987, having been sent by ordinary mail. In accordance with subsection 70(2) of the Board's Rules of Practice, March 20, 1987 was the deadline for filing of statements of desire to make representations about the representation vote or any other issue in this application. This deadline was clearly indicated in the Board's notices to the parties and employees of the returning officer's report. At the hearing scheduled to consider the objection set out in this letter, counsel for the union argued that the Board should not entertain the objection because it had not been filed in a timely manner.

3. We invited and heard argument with respect both to this matter of timeliness and to the question whether, assuming the truth of the facts alleged and conceded by its counsel, there was any basis for the result contended for by the employer. The facts alleged and conceded by counsel for the employer are set out in the next three paragraphs.

4. After this application was filed, the Board authorized a labour relations officer to confer with the parties on matters relating to the applicant's request for a pre-hearing vote and obtain certain information, including the parties' positions on the contents of a voters list and on the vote arrangements which would be appropriate if the Board were to grant the request. D.B. is an employee of the respondent who has been away from work on workers' compensation since August 1986. The parties agreed on a list of employees who would be eligible to vote if a vote were directed in the voting constituency corresponding to the bargaining unit which they agreed would be appropriate in this application. D.B.'s name appeared on that list, and no one suggests it should

not have. Nevertheless, Mr. Myers, the union's representative at the meeting with the labour relations officer, left that meeting believing D.B. was not eligible to vote. G.D., an employee supporter of the union, communicated Myers' belief to D.B. some time before the day of the vote. The employer does not allege that G.D. was acting on behalf of the union in so doing.

5. After the Board subsequently directed that a pre-hearing representation vote be conducted, the list of employees agreed to by the parties was used as the voters list. As we have already noted, D.B.'s name was on that list. Copies of that list were posted in the work place along with the Board's Notice of Taking of Vote, in accordance with the arrangements agreed to by the parties at their meeting with the labour relations officer. The vote was conducted by the Board at the work place on March 12, 1987. Polls were open between 6:30 and 7:15 o'clock in the morning and again between 2:30 and 3:45 o'clock in the afternoon. Some time after the morning poll closed, Mr. Myers learned that the Returning Officer considered D.B. eligible to vote. Mr. Myers then asked the employee who was acting as the union's scrutineer to have D.B. contacted and told that he was eligible to vote. As a result, G.D. contacted D.B. at his home by telephone and told him that he was considered eligible to vote. The employer does not challenge the union's assertion that this conversation occurred at about noon on the day of the vote. Counsel for the employer says D.B. would testify that he was confused by this call and attempted to contact Barbara Chapple, the respondent's controller, by telephone. She was not available to answer his call, and he did not request that his call be returned. D.B.'s home is about 10 miles from the respondent's plant. His wife had the family car with her at her place of work that day.

6. D.B. did not attend at the plant to vote. He spoke to Ms. Chapple the following day by telephone to discuss his fringe benefits. It was when this conversation turned to the vote conducted the previous day that the employer, through Ms. Chapple, first learned of the conversation G.D. had had with D.B. about his eligibility to vote. After discussing the matter with counsel, Ms. Chapple and Mr. Lansens, the respondent's president, visited D.B. on March 14th to get further particulars. They thereafter instructed counsel, who drafted his letter of March 20th and asked his secretary to send it to the Board by registered mail that day. Had she registered the letter there would have been no question of timeliness, since a document sent to the Board by registered mail is deemed filed when mailed, whereas filing by any other means, including ordinary mail, takes place only when the document is received by the Board.

7. On the matter of the timeliness of its objection, counsel for the employer argues that the Board should extend the time for filing of objections in the exercise of its discretion under subsection 82(2) of the Board's Rules of Procedure, as the clerical error here has caused no actual prejudice or delay. In opposing that request, counsel for the union drew our attention to the observations of the Board in *H.D. Lee Company of Canada Limited*, [1975] OLRB Rep. Jan. 55. In that case, an employer's statement of desire to make representations about alleged union misconduct in connection with a representation vote had been filed on the day after the deadline specified by what is now section 70 of the Board's Rules of Practice. At paragraph 17 of its decision, the Board said

... It is important to note that the Board may finally dispose of an application for certification at the conclusion of the six day period following the posting by the employer of both the Returning Officer's Report and the relevant form. And it follows that if the Board's procedure are [sic] to remain expeditious the Board must be able to rely upon its own deadlines. In other words, parties must be encouraged to comply with time limits set out in the Board's Form and Rules of Procedure or otherwise the entire administrative process will become ineffectual through lethargy.

After acknowledging that the Board should not take an unduly technical view of its procedures,

and that it must balance the need for informal flexibility against the need for expedition, the Board observed at paragraph 19 of its decision that

...the test of prejudice does very little for administrative expedition and certainty, and were it applied to fundamental procedural documents in matters before this Board administrative speed would become history.

Following the Board's decision in *Pure Spring Canada Ltd.*, [1964] OLRB Rep. Dec. 476, the Board concluded that the test to be applied in determining whether to entertain an untimely objection in connection with a representation vote was whether, even with the exercise of reasonable diligence, the factual basis of the objection would not have come to the attention of the objector until after the time for making objections had expired. At paragraph 21 of its decision, the Board explained that

... in cases of this kind dealing with a fundamental procedure of the Board, the Board must give paramount consideration to the speed and certainty of its procedures. Prejudice to another party is not a test that can accomplish this. Such a test does not provide a bright line for the challenging of documents and prejudice may have little or no relation to administrative expedition. Thus the test in this area emphasizes the reasonable diligence of the party asking the Board to amend the time limits and because the applicant failed to adduce evidence that would meet this test, the charges cannot be entertained.

8. In the matter before us, counsel for the union argued that the employer had not satisfied the reasonable diligence test, especially when the allegations set out in the letter of March 20th were based on an investigation completed six days earlier.

9. We agree with counsel for the union that the reasonable diligence test is the test which ought to be applied in this case to determine whether to entertain the employer's untimely objection and that the employer has not satisfied that test. We are also satisfied that we would not set aside the vote even if the employer's objection were timely and the facts alleged in support of it were proved to be true.

10. It is important to observe that the objector here is the employer, not the employee whose circumstances are the subject matter of the objection. D.B. had notice of his opportunity to object, but did not do so. He was present at our hearing. He remained silent when, after two employees sought to make submissions, we asked whether any other employee present wished to make submissions. It may be that the objection made by the respondent would not have been successful if made by D.B. on his own behalf. In *Harold's Furs*, [1983] OLRB Rep. Nov. 1843, for example, the Board refused to set aside a vote at the request of employees who had not voted because their supervisors advised them there were not eligible to vote. Some of the reasons for that decision are certainly applicable here. The question before us, however, is not whether D.B. would have been entitled to the relief sought had he made the objection now before us. The employer has no status to complain on behalf of its employees or any of them nor, we should add, did counsel for the respondent purport to do so here. The question we are addressing is whether the employer would be entitled to the relief it seeks if the facts it alleges were true.

11. Among the matters discussed by the parties before the vote was conducted was the manner in which notice of the conduct of the vote would be given to those employees who were or might be eligible to vote. The respondent agreed that notice should be given by posting a copy of the Board's Notice of Taking of Vote in Form 69, together with a copy of the voters' list, at each of three locations in the work place. The respondent effected these postings as contemplated by the arrangements to which it had agreed. It has no complaint about the content of the notices or the

length of time they were posted prior to the vote. The Form 69 notices posted in the work place contained this statement, among others:

The Returning Officer is the proper person to whom inquiries should be directed by employees who are in doubt as to their eligibility to vote or as to the voting procedure.

The following notation appeared in large red capital letters on each page of each voters list posted beside each Notice of Taking of Vote:

ANY EMPLOYEE WHOSE NAME DOES NOT APPEAR ON THE VOTERS' LIST OR CHALLENGED VOTER WHO FEELS THAT HE OR SHE IS ENTITLED TO VOTE SHOULD TAKE THIS MATTER UP WITH THE RETURNING OFFICER DURING THE TAKING OF THE VOTE.

As we have noted earlier, D.B.'s name did, in fact, appear on the voters lists posted in the work place.

12. Whatever might have been said by D.B. had he filed an objection, it is not open to the employer to complain that D.B. did not have adequate notice of the contents of these notices by reason of his being absent from the work place "on workers compensation", since that fact was known to the employer when it participated in the formulation of the vote arrangements: see *Alan G. Cook Limited*, [1972] OLRB Rep. Dec. 991 at paragraph 15 and *Ontario Cancer Foundation*, [1983] OLRB Rep. Feb. 246 at paragraph 6. As against the employer we must assume that, but for the conduct complained of, D.B. had the means and ability to learn what was stated in the materials posted in the work place.

13. Employees eligible to vote are under no compulsion to vote or even to read the Board's notices with respect to the vote. All that can fairly be expected of the vote process is that eligible employee voters as a class have a reasonable opportunity to vote and, to that end, that notice of the vote will be so given as to be reasonably likely to come to their attention. In assessing whether the results of a vote are unreliable as a result of others' communications to voters about the voting process or the subject matter of the vote, the Board is not concerned about misrepresentations unless they have interfered either with the voters' ability to evaluate the information available to them or with their ability to freely express their wishes in casting their ballots: see *Staffer-Dobbie Manufacturing Co. Ltd.*, 59 CLLC ¶18,147; *Indusmin Ltd.*, [1982] OLRB Rep. Nov. 1641; *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19; and, *Harold's Furs*, *supra*. The test is an objective one. The Board's approach is to determine the likely effect of the impugned conduct upon an employee of average intelligence and fortitude: *Greb Industries*, [1979] OLRB Rep. Feb. 89. Because of concern for the secrecy of the balloting, the Board generally avoids enquiry into the subjective state of mind of an individual voter in assessing the effect to be given to the results of a vote: see *RSLs Inc.*, [1982] OLRB Rep. June 921; and, *Children's Aid Society of the Regional Municipality of Waterloo*, [1985] OLRB Rep. Dec. 1818.

14. Starting from the necessary premise that notice to D.B. of his opportunity to vote was otherwise adequate, we cannot conclude that notice to him was made inadequate by G.D.'s telephone calls. Those calls did not interfere with D.B.'s presumptive ability and opportunity to ascertain the contents of the Board's notices. They did not interfere with his ability and opportunity to attend on the day of the vote and speak with the Returning Officer. Indeed, they did not interfere with his ability and opportunity to make further inquiries of others well before the date of the vote. Assuming the truth of what the employer alleges, we would conclude that D.B.'s having not voted was the result of choices he made without coercion or interference of the sort which would lead us to direct a new vote.

15. As there are no other matters in respect of which any interested person has expressed the desire to make representations, we may now deal with the issues which remain outstanding in this application.

16. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

17. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Blenheim, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

18. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

19. As more than fifty per cent of the ballots cast in the taking of the pre-hearing representation vote directed by the Board were cast in favour of the applicant, a certificate will issue to the applicant.

20. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

3392-84-U Ontario Public Service Employees Union, Complainant v. Superior Ambulance Limited, R. J. Armstrong and Al Erlenbusch, Respondents

Interference in Trade Unions - Unfair Labour Practice - Employees of ambulance service asked by Ministry of Health to participate in pilot para-medical program by taking a leave of absence - Participants asked to sign leave renewal agreements on same terms and conditions when program extended - Whether employer bargaining directly with employees - Conditions of work outside scope of the collective agreement from which the union derived its bargaining rights - No bargaining directly with employees - Complaint dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair and Board Members *J. P. Wilson* and *H. Kobryn*.

APPEARANCES: *Alick Ryder*, Q.C., for the applicant; *B. R. Baldwin*, *Maynard Ross* and *Ira Ross* for the respondent; *Leslie McIntosh* for the respondents *Al Erlenbusch* and *R. J. Armstrong*.

DECISION OF THE BOARD; May 25, 1987

1. For reasons given *infra*, *R. J. Armstrong* and *Al Erlenbusch* have been added as respondents to this complaint.

2. This complaint made under section 89 of the *Labour Relations Act* alleges that sections

66 and 67(1) of the Act have been violated by Superior Ambulance Limited directly and through its agents R. J. Armstrong and A. Erlenbusch and by Armstrong and Erlenbusch personally. The original complaint named only the corporate respondent. Counsel later wrote to the Board requesting leave to amend the complaint by adding as respondents the Ministry of Health for the Province of Ontario, Armstrong and Erlenbusch. The complainant abandoned its claim against the Crown in right of the Ministry of Health before the complaint came on for hearing. Then, at hearing, complainant counsel advised the Board in his opening statement that the complainant was no longer seeking the addition of Erlenbusch as a respondent. Therefore the complaint is dismissed against Erlenbusch.

3. Sections 66 and 67(1) of the Act provide as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

67. (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

4. The actions of Superior and Armstrong which are alleged to be violations of sections 66 and 67(1) of the Act relate to certain dealings they are alleged to have had with several employees of Superior who were participants in or had completed a course of training in an Advanced Life Support Pilot Program (hereinafter "the Program") of the Ministry of Health of the Province of Ontario. The complainant is the exclusive bargaining agent of the employees pursuant to a collective agreement with Superior. The complainant's allegations stated generally are that Superior, directly and through Armstrong, and Armstrong personally bargained terms and conditions of employment with the employees individually contrary to section 67(1) of the Act and, when the employees rejected the proposed terms and conditions and exercised their rights under the Act to be represented by the complainant, they were threatened with removal or were removed from the Program as punishment for having exercised their rights under the Act, contrary to sub-sections (a) and (c) of section 66 of the Act.

5. The particulars of the alleged unlawful acts include the following:

- (1) Armstrong offered employees in the Program at a meeting called by him a five per cent increase in wages and premium pay for overtime and for work performed on statutory holidays.

- (2) Armstrong withdrew that offer at a later meeting with the employees which also had been called by him.
- (3) Armstrong, Erlenbusch and Ernie Jones, all of the Ministry, personally and on behalf of Superior, called a third meeting of the employees in the program and made an offer to them respecting their wages and premium pay for overtime and statutory holiday work. Armstrong personally and on behalf of Superior threatened the employees against exercising their rights under the Act when he told them that employees who previously had refused the offered terms and had been removed from the Program would not be allowed to return to it.
- (4) Armstrong personally and on behalf of Superior made an offer in writing to an employee of Superior.
- (5) Maynard Ross, owner of Superior, caused three of Superior's employees who had completed a course of training in the Program to be removed from it because they refused to engage in private bargaining with him about the terms for them continuing in the program.
- (6) Armstrong and Erlenbusch, personally and on behalf of Superior, refused to permit two of Superior's employees, who had been removed from the Program along with three other employees of Superior, to return to the Program immediately after the complainant and Superior had agreed on terms for the reinstatement and employment of the five employees in the Program, in order to punish the three employees for having exercised their rights under the Act.

6. Prior to the complaint coming on for hearing, the complainant was seeking the following relief:

- (1) A declaration that the respondents had violated sections 66 and 67(1) of the Act as alleged.
- (2) An order that the respondents cease and desist from violating the Act and from any further violations of it.
- (3) An order that the respondents reinstate to the Program the five employees of Superior who had been removed from it.
- (4) Compensate the employees for the loss of wages and benefits arising out of the failure of the respondents to continue the employees in the Program, or, should the Board not order reinstatement, order damages representing the wages and benefits which the employees would have received had they been continued in the program.

When the parties finally came before the Board for hearing of the complaint, the complainant and Superior agreed that the complainant's claim for damages against Superior shall be limited to recovery of the costs of requalification in the Program for five Superior employees: E. Kenna, M. Nelles, M. Posteraro, J. Ramage and W. Reiach.

7. The events giving rise to this complaint began in January 1984 and continued into 1985 until this complaint was made March 19, 1985. The complaint was adjourned *sine die* on consent of the parties. Hearings into the complaint eventually began in late November 1985 and were completed at the end of February 1986.

8. The Board's findings of facts about the relevant events are made from the testimony of Jacqueline Gardner, James Ramage, Evelyn Kenna and Mark Nelles for the complainant, Richard

Armstrong and Ira Ross for the respondents. The Board has assessed their credibility according to the usual criteria and what is reasonably probable having regard to the evidence as a whole. At all material times Gardner was staff representative of the complainant for the Hamilton area, Armstrong was acting manager of the Program for Erlenbusch who was on leave of absence, and Ross was co-owner of Superior and responsible for its labour relations.

9. The Program was started by the Ministry in January 1984 in two test areas, Metropolitan Toronto and Hamilton. The duration of the Program was to be from January 1984 to June 1985. Eventually it was extended for a further six months to the end of 1985. The regular ambulance services in Ontario provide basic life support. Advanced life support is a para-medical service. The Program was established as a research project in order to test the form and content of an Advanced Life Support service and to gather data as a basis for assessing the effectiveness of the service and deciding whether a province-wide para-medical service would be viable. It was expected that persons selected to participate in the Program would be in it for 49 weeks, the first part of which was a 12-week period of study at the Toronto Institute of Medical Technology (hereinafter "TIMT"), followed by a period of clinical study at a hospital. For the balance of the Program, participants were assigned to work under medical supervision provided by the supervising hospital on vehicles carrying special life support equipment and drugs, operating from various bases in the Hamilton area to answer emergency calls. This was the work experience part of the Program for the participants and the research part of it for the Ministry. Participants who completed the 49 weeks and passed written and oral examinations received a diploma. The parties referred to them as graduates. Other active participants were referred to as students. For ease of reference the Board will adopt those terms.

10. The work experience part of the program involved the students in performing prescribed medical procedures. In order for them to be able to perform those procedures, they had to have authority delegated by a practitioner qualified pursuant to the *Health Disciplines Act* and be under the supervision of such a practitioner. The same condition would apply to graduates who continued in the extended program. That is the key distinction between the Basic Life Support service provided by the ambulances services of Superior and the other two operators, and the Advanced Life Support service of the Program.

11. Superior is one of three ambulance services operating in the Hamilton area. The other two are Danver Ambulance Service and Fleetwood Ambulance Service. Armstrong met with representatives of the three operators and Gardner on November 14, 1983, and informed them of the Ministry's plan to introduce the Program in the Hamilton area. He told them that there would be 14 places in the Program and that they would be available to full-time driver attendants employed by the three services who could satisfy the qualifications and admission procedures for the Program. Armstrong informed the meeting that students would need to take a leave of absence from their employer but would be paid a weekly salary based on 40 hours at the hourly rate they had been earning as a driver attendants. Payment of the premiums for their benefits also would be continued, but no overtime would be paid. Salaries would be paid on cheques of the ambulance services with whom they had been employed and the operators would also make the benefit payments on the students' behalf. The Ministry was to provide transportation from Hamilton to TIMT. Armstrong elaborated as follows on the conditions in response to a series of questions from Gardner. The students would receive any merit or anniversary increases that would have applied in their driver attendant job. They would be required to work shifts but would not be paid shift premiums or for working on statutory holidays. They would be eligible to use vacation and sick credits. The Ministry would provide the funding for the payments of students' salaries and benefits and for the wages and benefits of the employees who replaced those who went into the Program.

12. It is useful to refer here some of the other mechanics of the Program. The specially equipped vehicles used by the students for the operational part of the Program were supplied by the Ministry. The Ministry, also made arrangements with Superior to provide garaging and servicing for them. Doctors of the emergency services department at McMaster University Hospital (hereafter "McMaster") provided the medical supervision for the students on the emergency vehicles. The scheduling of their work was done by the Program co-ordinator, a registered nurse hired by McMaster for the Program. At the start of a shift, the students would pick up their vehicles at Superior, report to McMaster for medical supplies and instructions and then proceed to the assigned base to await dispatch on emergency calls. Any discipline issued to students during the Program would come from the persons supervising the phase of the Program at which the need for discipline arose. Such discipline would not be reported to a student's ambulance service employer.

13. After Armstrong's meeting with the ambulance service operators and Gardner, Gardner distributed to the driver attendants a document dated November 15th setting out her understanding of the conditions which would apply should they participate in the Program. She also expressed the need for the employees to ratify the conditions before the start of the Program. Armstrong met with prospective participants on November 20th and explained how the Program was expected to work, the entry qualifications and the conditions available for employees who entered the Program. About a month after that meeting, Gardner addressed the following letter to Superior dated December 19th:

"I am writing to you concerning replacement staff for successful A.L.S. employees.

In order to assist the Ministry in the new A.L.S. programme, Local 207 has voted in favour of the following:

1. All new employees hired to replace successful candidate to the A.L.S. programme must be hired as regular full-time employees with the appropriate rate of pay and all benefits as per the collective agreement.

The Union recognizes these employees are subject to lay off if the A.L.S. students return to Superior at any time.

2. New hirees must come from the current part-time employees of Superior Ambulance Service who do not have full-time positions elsewhere.
3. If lay off is necessary, full-time will be able to displace part-time staff first.
4. *Seniority will continue to accrue for those ambulance attendants who attend the A.L.S. programme.*

As the results of the A.L.S. interviewing should be known this week, I would ask you call me to finalize our mutual understanding of the procedures to be followed."

While the letter is directed primarily to certain conditions for employees who replaced those entering the Program, the emphasized passages clearly relate to conditions for students in the Program. Superior did not at any time signify in writing agreement with the terms set out in the letter. The collective agreement in effect at the time had an expiry date of March 31, 1984. The parties did not make the terms of Gardner's letter part of the renewal agreement between the parties which was signed February 28, 1985 to have effect from April 1, 1984 to March 31, 1985. The uncontradicted evidence is that Superior applied the terms of the letter nonetheless.

14. It is accepted by all parties that the students would be on leave of absence from their employers and that the duration of the Program would be 49 weeks. No particular format was adopted for the requesting and granting of leave. Superior accepted the requests as written by

eight of its employees who were accepted into the Program. Two examples are in evidence before the Board. Their texts are as follows:

"Please except [sic] this letter as request for time off, for the duration of the pilot ALS program. This request is in conjunction with the contract released from TIMT, pertaining to wages, benefits and return to employment [sic] after *or* during this program."

* * *

"I, (name deleted), request a Leave of Absence, to commence on March 11th, 1984, & continue while I am participating in the Paramedic Program.

It is agreed I will receive full wage & benefit compensation during this leave, & any increases negotiated & agreed upon on my behalf, by the union, any other agency or party, will be granted.

In addition, it is agreed my seniority [sic] will continue to accumulate during this leave.

It is further agreed upon, that at any time, I may return to the position I leave (at least this level of responsibility), whether I was to discontinue in the program by choice or otherwise, immediately upon submitting a written request to terminate, this Leave of Absence.

Amendments to the above Agreement, may only be made, if all of the parties below, or their duly appointed representatives, concur."

The first quoted was signed by the employee and countersigned as accepted by Ira Ross for Superior to begin on a specified date. The second was signed by the employee, the union steward and Ira Ross for Superior.

15. Eight of Superior's employees applied for and obtained leave of absence to enter the Program. Part way through the Program, five of these employees, while still students in the program, filed grievances claiming that they had been refused overtime pay for work on a statutory holiday or for working beyond a regularly scheduled shift. One of the grievances went to arbitration. The arbitrator found that Superior had allowed the grievor paid leave of absence even though the collective agreement did not provide for it and was otherwise silent respecting the status of employees on paid leave. The arbitrator found also that the complainant herein and Superior had not agreed on terms for overtime and dismissed the grievance. The award issued in June 1984.

16. Sometime prior to October 1984, the Ministry decided that the Program had not produced enough data from which to draw conclusions for a decision on the effectiveness of an Advanced Life Support service and that the Program should be extended for a further six months to the end of 1985. Armstrong was delegated to advise the students and the parties affected. He met with Gardner on October 2, 1985, and informed her of the decision to extend the Program and explained the need for the extension. He told her as well that the Ministry was providing additional funds for the Program and would be paying a five per cent increase to everyone who completes the 49 weeks and remains in the Program. They would also be paid for overtime and working on a statutory holiday. Armstrong explained to Gardner that the extra funding would be flowed through the operators so that the increase and any payment for overtime and worked statutory holidays could be included in the cheques issued by the operators for the basic 40 hours. He told her supplementary funding would be stopped for anyone leaving the Program. Armstrong advised Gardner that he would be conveying this information to the participants. He had not told Superior or the other operations prior to the meeting that he was going to be meeting with Gardner.

17. Armstrong met with the Program participants early in November. There is some confusion in the evidence of witnesses who attended the meeting as to its precise date. It was likely

November 9th, but nothing turns on the date. There were subsequent meetings, so the Board will refer to the first one by that date. Armstrong did not invite Gardner to the first meeting because he had already informed her of the matters he would be announcing. He had told the operators prior to meeting the students that he would be announcing an increase and the overtime and statutory holiday payments. He got their agreement to flow the extra funds through them so that these payments could be made on their cheques. He did not tell them of the amount of the increase prior to the meeting with the students. Armstrong told the students at the meeting that the Program was being extended and that the Ministry was providing extra funding so that the conditions available to anyone staying in the Program after completing the 49 weeks would include a five per cent increase and payment for overtime and working on statutory holidays. When he finished his explanation, he answered students' questions. Some expressed disappointment and dissatisfaction with the increase, and one seemed angered by it.

18. When news of the meeting reached Gardner it drew a quick response and protest to Armstrong for announcing a five per cent increase. She telephoned him the same day as the meeting and then addressed a letter to him dated November 16th, the text of which is:

Further to our telephone conversation of Friday, November 9th, 1984 the following is OPSEU's position on graduates of the Paramedic Programme.

SALARY

Your offer to increase the salary level of graduated paramedics to the Public Service start rate for Nurse 2, General, is unacceptable for a number of reasons. Firstly, the Ministry of Health is not the recognized employer as there are current collective agreements with the three owner/operators of Fleetwood, Superior and Danver. If however, you are prepared to put in writing that the Ministry is in fact the real employer, then OPSEU will entertain bargaining with the Ministry.

Secondly, your opening offer is an interesting opener but as I mentioned to you over lunch on October 2, 1984, any changes to the collective agreement including salary would need to be negotiated and ratified by the bargaining unit involved.

VACATION

It is OPSEU's position that paramedics should be allowed to take their vacations in accordance with their collective agreements.

OVERTIME

As per the collective agreements.

LEAVE OF ABSENCE

Upon receipt in writing from the Ministry of Health as to what the projections for continuation of the pilot would be, OPSEU will take to its membership for ratification extension of leave of absence as it pertains to seniority.

SUMMARY

In summary, it is OPSEU's position that all of the above must be properly negotiated with OPSEU, who is the recognized bargaining agent for the paramedics from Fleetwood, Superior and Danver Ambulance Services.

As the first scheduled graduates of the Paramedic Programme are due to graduate in early December, it is expected that any negotiated improvements to their current collective agreement would be retroactive to their date of graduation.

I look forward to hearing from you and/or the owner operators with a date to set up bargaining.

That response provoked a decision in the Ministry to withdraw the increase. Armstrong met again with the students on November 30th to inform them of the decision. He read Gardner's letter to them and told them, because of the letter, the five per cent increase would not be paid. Armstrong also told the students that the matter of leaves of absence from their employers for the extended Program was between them and the employers. The same day he addressed the following reply to Gardner's November 16th letter:

"Thank you for your letter of November 16, 1984 regarding your concerns over the pilot paramedic program in Hamilton.

I wish to inform you that the Ministry of Health is not the employer of the students participating in this program as these individuals are on a leave of absence from their employers. Therefore, I wish to confirm that as a result of your concerns, I have advised the students that we do not wish to appear to be interfering with the bargaining process between them and their employers in any way. As a result, any monetary discussions I have had with them while they were on a *leave of absence* from their employer are not to be given any consideration whatsoever in any negotiations that may take place with their employer.

Clearly, their continued involvement on the pilot program is an issue between them and their employer (the ambulance service) and the Ministry has no involvement in this process.

I should further advise you that the Ministry wishes to continue with the *pilot* program until December, 1985 and look forward to continued involvement of all of the students."

19. Shortly after the November 30th meeting, two students who had completed their 49 weeks and had graduated from the Program, did not renew their leaves of absence from Superior, for reasons explained *infra*, and returned to their driver attendant jobs. Ira Ross told Armstrong immediately. Armstrong thought their leaving the Program was a response to withdrawal of the increase and that others might leave as well, jeopardizing the Program. He obtained a decision to reinstate the increase. On December 20th, he met with the students, that is, the remaining Program participants, and informed them that the five per cent increase would be paid. He confirmed that payment for overtime and work on statutory holidays remained as originally announced. Gardner was not at the meeting and when informed of it that same day, delivered this written reaction to Armstrong:

"It has come to my attention that you met today with the remaining Paramedics to offer them a wage increase when they are certified as Paramedics, overtime and premium pay for statutory holidays.

This letter is written to express my concern that once again you are interfering in negotiations without authority. This is not to suggest OPSEU does not at this time nor in the immediate future wish to have a speedy resolution to the current problems we are experiencing with the Paramedic programme in Hamilton.

In that regard, I offer you once again to meet with all parties and members of the bargaining units I represent to discuss proposed ways to deal with the Paramedic programme for those who are currently graduated and for those who will graduate in 1985.

If it is not your intent to meet with us, I will then be seeking legal advice as to what other avenues I can pursue [sic] in regards to your continued interference and unwillingness to meet to resolve this problem."

Armstrong replied the next day as follows:

"Thank you for your letter received today by taxi regarding the "paramedic" students on a leave of absence from their ambulance services.

I must once again clarify with you that the ministry is not the employer of these students and in fact, these students are on a leave of absence from their respective ambulance services. Therefore, any discussions we have with these people are between them as individuals and the advanced life support pilot program and do not in any way involve the union.

I have not met with nor will I meet with any individual that removed themselves from the program and request that the union involve itself in negotiations with their employer, the ambulance service. Also, I did not comment on any issues between the union and the ambulance operators as clearly they have nothing to do with the pilot paramedic program.

However, I should advise you that I feel the union is interfering with the operation of this program and has no right to do so."

At a meeting on January 7, 1985, after discussion of some operational matters, Armstrong gave each of the remaining students the following letter of the same date, confirming what he had told them at the December 20th meeting about the five percent increase and the payment for overtime and statutory holiday work.

" I am writing to confirm the discussion between you, as an advanced life support program student on a leave of absence from your employer, and myself as one of the pilot program managers.

Should you choose to continue in the pilot program, the program has funds built in to augment your basic ambulance attendant salary by 5% and cover the cost of overtime once you graduate from the 48 week training program. However, I wish to make it clear that the additional funding is provided solely [sic] in recognition that you are no longer a student and is not in any way to be associated with any position classification as this is to be achieved at a later date. Also, it must be understood that this has no bearing whatsoever with any agreements between you and your employer.

Finally, I must again state that this is not an offer subject to any negotiations of any kind. It is solely [sic] your decision to continue in the pilot advanced life support program under these conditions or return to your normal ambulance duties with your employer."

20. When Ira Ross of Superior learned that the Program was to be extended, he decided that employees who wished to remain in it should renew their leaves of absence. This time, however, after consulting legal advice and the other operators, he decided that the conditions of leave should be set out in writing. The legal advice came from Superior's legal counsel in the instant case. He is spokesman for the operators in collective bargaining with the complainant. As a result of the advice received, Superior adopted the following format for renewing leaves of absence:

REQUEST FOR EXTENSION OF LEAVE OF ABSENCE

As you are aware, the Advanced Life Support Pilot Program for which I was given a leave of absence has been extended to December 31, 1985. Accordingly, I am requesting an extension of my leave to continue participation in the Program until December 31, 1985.

I understand that I will continue to receive my rate of pay as a Driver Attendant between the Company and my Union. This pay will be based on forty (40) hours pay per week for each week of my participation in the Program. No overtime will be paid to me during my Leave of absence.

I also understand that the premium cost for existing benefit [sic] programs will continue to be paid on my behalf by the Company for the duration of my absence.

My seniority will continue to accumulate during my Leave of absence. Should I return or be

returned to the Company for any reason during my Leave of absence, my former job as an Ambulance Driver Attendant will be made available at the rate of pay for such classification.

I understand that I have been granted the privilege of wearing my Company uniform and shoulder badge while on my Leave of absence in the program. Therefore, I accept that I will behave in a manner acceptable to the persons in charge of the Program or any persons to whom they delegate their authority or to whom I am responsible.

It is common ground that the conditions set out in the paragraphs following the first one are the conditions which had applied equally to Superior's employees throughout their initial leaves of absence. These conditions had not been reduced to writing in any uniform way as between Superior and the employees or Superior and the complainant. Ross decided it was necessary to specify the terms of the leave in writing because of the statement in the arbitration award that the collective agreement did not provide details as to the status of employees while on leave, the fact that there had been a dispute over matters which the arbitrator found were not conditions applying to the leave and Ross' belief that there would be a grievance or grievances for more pay for graduates of the Program. He formed his belief from comments he claims were made to him by some of the students and by the complainant's chief steward at Superior.

21. James Ramage, who testified in these proceedings, and Mario Posteraro, who did not, were the first students from Superior to graduate from the Program. Therefore, they became the first employees to be asked to renew their leaves of absence. They were given copies of the leave document several days before December 10, 1984, the date when they were asked to sign it. They went together to Superior's office to get Maynard Ross who, with Ira Ross, is co-owner of Superior. Maynard Ross saw them individually, each in the presence of the chief steward, and asked each if he would sign the leave of absence. Ross terminated their leaves of absence effective immediately when they declined to renew them in the form presented. They returned to their job of driver attendant for Superior. On or about December 18th Evelyn Kenna met Ira Ross at Superior's office and was asked if she was going to renew her leave of absence and continue in the Program. She had been given a copy of the leave of absence format at least a week earlier. Kenna told Ross she would not be continuing the Program because she was not prepared to renew her leave in the form presented. The same result obtained when Mark Nelles and Walter Reiach saw the Rosses on or about January 11th, 1985. The three of them returned to their jobs as driver attendants for Superior. All five employees were reinstated in their jobs with accumulated seniority and at the rates of pay that would have applied had they not been on leave.

22. Ramage stated four reasons to the Board why he refused to renew his leave of absence in the form presented by Superior: the increase for the extended Program offered by Armstrong was not enough; the offer had not been put through the complainant; the leave of absence did not refer to overtime and it had not been seen by the complainant prior to him being asked to sign it. Ramage admitted that Posteraro, who had been the complaint's chief steward at Superior before going on the program, had discussed its terms with Gardner. In cross-examination, Gardner acknowledged that she had advised Posteraro and Ramage to stay out of the Program in the hope that she could get something more than Armstrong had said was to be paid. For Kenna and Nelles the main reason they decided not to sign the leave of absence renewal was peer pressure. They did not want to remain in the Program if their fellow employees who had left it could not get back in. Gardner advised Posteraro and Ramage to file grievances with Superior because of the form and manner in which they were asked to renew their leaves of absence. Each filed an identically worded grievance dated December 10th, the same day their leaves of absence were terminated. Their grievance is '... that the employer has violated the collective agreement by attempting to enter into negotiations with me personally and force me to accept working conditions that are

contrary to the Employment Standards Act of Ontario.'. The settlement requested is that the employer:

- (1) "... negotiate with the official bargaining agent, the Ontario Public Service Employees Union amendments to the collective agreement to include terms and conditions of my employment as a paramedic.".
- (2) "... intercede with the Ministry of Health for immediate reinstatement to the Paramedic Program ...".

Superior's reply to both grievances given December 21st at the second step of the grievance procedure was:

"In reply to your grievance dated December 10, 1984, it is our position that there has been no violation of the Collective Agreement.

The Ambulance Service has no control over the content of the Paramedic Program and the hours required of persons who volunteered to participate in this program. The initial leave of absence was predicated on the understanding that the Program would be approximately 48 weeks in duration. The Ministry of Health has now determined that the Program is to be extended for a further period of time. This again is a matter over which we have no control.

There has never been any attempt to negotiate with you regarding the terms of your leave of absence and we never attempted to force you to accept conditions which might be contrary to an employment standard."

23. A copy of Gardner's letter to Armstrong dated December 20th, 1984, in which she claimed he was bargaining with employees for whom the complainant is the exclusive bargaining agent, came into the possession of counsel for Superior herein. It prompted the following letter dated January 8, 1985:

"I have been forwarded the copies of your letter to Rick Armstrong dated December 20, 1984 which you sent to B. Uildersma of Fleetwood Ambulance Service and M. Ross of Superior Ambulance Limited.

It would appear that the issues raised in your letter relate to leaves of absence and rates of pay, and would be appropriate for discussion in the course of collective bargaining. I have not yet been advised by my clients of any notice to bargain from your Union and draw your attention to the termination provision of the Collective Agreements in effect at Fleetwood and Superior which require proper notice."

Approximately three weeks later, Gardner wrote as follows to Maynard Ross at Superior:

"I am writing to you concerning the employment of five (5) graduates of the Paramedic Training Course. These individuals perform in a new classification not contemplated by the collective agreement. OPSEU takes the position you must bargain with us to reach a settlement.

In the interim, I have instructed our lawyers to file a Section 89 Complaint under the Labour Relations Act naming Richard Armstrong, Ministry of Health, as an Agent.

OPSEU is very interested in resolving this outstanding issue between us and hope an amicable solution can be reached immediately, to ensure the pilot program continues and the citizens of Hamilton are provided with the best care available."

His response to Gardner was:

"Regarding your letter of Jan. 25/85, Paramedic classification.. [sic] The five persons who have returned from their training course, are now functioning as basic life support driver attendants. Our company does not have a paramedic classification and furthermore does not employ any

persons doing the functions of a paramedic. Therefore there is no point in bargaining for such a classification."

24. On consent of the parties, the Board admitted documentary and *viva voce* evidence of steps taken by Ramage, Kenna and Nelles after the making of this complaint to be re-admitted to the program. The documentary evidence consists of letters addressed from Ramage and Kenna, individually, to counsel for Superior, from Kenna to Gardner and Superior and from Nelles to Armstrong. The *viva voce* evidence was with respect to a meeting Kenna and Nelles had with Armstrong at their request. All of the letters include a request to be re-admitted to the Program and they express their individual views as to why they were removed (their term) from the program, their sense that they were the victims of the parties and some of the parties' representatives having given a higher priority to their own objectives than those of the Program and the participants, and their feelings of frustration and helplessness over the parties' inability to resolve the issues between them.

25. The complainant has alleged that Superior and Armstrong have violated sections 66 and 67 of the Act. It alleges that students in the Program were threatened with removal or were removed from the Program as punishment for having exercised their rights under the Act contrary to subsection (a) and (c) of section 66. The particulars alleged are that Armstrong personally and on behalf of Superior told students remaining in the Program that former students who had refused terms of leave of absence offered by Armstrong and Superior would not be allowed to return to the Program; that Maynard Ross caused three of Superior's employees who were graduates of the Program to be removed from it because they refused to engage in private bargaining with him about the terms of continuing in the Program; and that Armstrong and Erlenbusch, personally and on behalf of Superior, acted as alleged *supra* at item (6) of paragraph 4 in order to punish two of Superior's employees for having exercised their rights under the Act. Complainant counsel did not pursue the alleged violations of section 66 in his final argument and the evidence before the Board simply does not support the allegations. Therefore the complaint insofar as it relates to section 66 of the Act is dismissed.

26. The parties made full submissions on the issue of whether there has been any violation of section 67(1) of the Act, whether by Superior acting alone or Armstrong acting personally or on behalf of Superior. The Board has reviewed and weighed their submissions, but will not attempt herein to detail their arguments.

27. The main thrust of complainant counsel's submissions was that, when employees are represented in collective bargaining by a trade union, it is settled law that there cannot be private contracts of employment between the employer and its employees respecting any matters falling within the purview of the union's bargaining rights. *Syndicat Catholique Des Employes de Magazins de Quebec, Inc., v. Compagnie Paquet Ltee.*, [1959] 18 D.L.R. (2d) 346; *McGavin Toastmaster v. Ainscough*, [1975] 5 W.W.R. 444. Further, that principle is incorporated in and extended by the prohibition in section 67(1) against individual bargaining, all of which is in keeping with the concept of exclusivity of bargaining rights held by a trade union, an exclusivity which is protected by other sections which enforce the recognition of those rights (section 15) and prohibit interference with the exercise of those rights (section 64). Section 67(1), in counsel's view, prohibits private or individual bargaining by an employer with any of its employees for whom a trade union has exclusive bargaining rights on any matters which can be the subject of collective bargaining, whether or not they are the subject of a collective agreement between the employer and the trade union. According to counsel the ingredients of individual, direct bargaining are offer and acceptance (or rejection) and, in the instant case, if those two functions lay between Superior and/or Armstrong on the one hand, and Superior's employees on the other, there is direct bargaining. Counsel argues that those ingredients were present when Superior sought to have the five employees renew their leaves of absence

in the format presented by the employer, and when Armstrong, in meetings with the employees on November 9 and December 20, 1984, and January 7, 1985, made the offer of a five per cent increase and payment for overtime and work on statutory holidays to graduates who stayed in the Program. When Armstrong made these offers he was acting outside of the Ministry's purpose and, therefore, outside of the protection of Crown immunity from being bound by the Act or having it apply to Crown employees, agents or servants. Counsel submits that Armstrong was also acting for Superior because, at the very least, Superior was aware that he was making offers to its employees and did nothing at any time to disclaim his acts. Therefore, counsel argues, Superior in its own right and Armstrong on his own behalf and on behalf of Superior bargained directly with Superior's employees for whom the complainant is the exclusive bargaining agent in violation of section 67(1).

28. The purpose of section 67(1) of the Act was discussed in the Board's decision in *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, at paragraph 17 as follows:

"To what extent can an employer communicate with its employees during the negotiating process? The scheme of the Act contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in the bargaining unit. The exclusivity of the unions [sic] bargaining rights is expressly protected by section 59 [now section 67], This section prohibits employers from bargaining directly with employees represented by a bargaining agent, ...".

It is apparent from the first sentence of the paragraph that the Board was dealing with communications directly between the employer and its employees during negotiations. The complainant had alleged that those communications violated various of the unfair labour practices sections of the Act, including what are now sections 15 and 64. The Board discussed in the following terms at paragraph 18 of its decision, the potential peril facing an employer who chooses to engage in such communications:

"18. The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now section 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56 [now section 64]. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent."

29. The question the Board asked itself in that case was whether the employer's communications with its employees can be characterized as an attempt to bargain with them. The Board found at paragraph 22 that the employer, at an early stage of the negotiations, "... had chosen to discuss the issues in dispute more fully with the employees than with their bargaining agent.". It found, in those circumstances, that the employer had been attempting to bargain directly with employees in violation of what is now section 67 of the Act. The Board also found that the employ-

er's conduct "... served to undermine the viability of the complainant as exclusive bargaining agent in violation of section 14 [now section 15] of the Act." Having found those violations, the Board found it unnecessary to decide whether other sections, including section 64 had been breached.

30. The general context of that case, that is direct communications by an employer with his employees during the course of negotiations and the allegation that the communications exceed the employers' "free speech" protection of section 64 and breach that section and section 67 of the Act, is the most usual context in which the Board sees complaints alleging violation of section 67. The Board's decision in *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609 was made in a context different from *A. N. Shaw*, *supra*, to the extent that the communications between the employer and some of its employees which were alleged to be a violation of sections 64 and 67(1) of the Act, had taken place during the "closed" term of the collective agreement and not during the course of negotiations. The Board in *American Can*, having referred to paragraph 17 of the *A. N. Shaw* decision quoted in part, *supra*, went on to acknowledge the section 67(1) prohibition on employers bargaining directly with employees represented by a union. The Board then found on the facts of the case that the employer had not committed a breach of that prohibition when it communicated directly with the employees.

31. The only factual similarity which the instant case has with either of the two above-referred decisions is, like *American Can*, that the impugned communications did not take place during the course of negotiations. Apart from that similarity, this complaint is distinguishable on its facts from both decisions.

32. The five employees who are the grievors under the complaint were on leave of absence from their employer, Superior, for the purpose of taking part in the Program. The jobs from which they had taken leave were filled by others. The students no longer performed those jobs. The jobs which they were fulfilling in the Program involved taking classroom courses, clinical training and applying the acquired knowledge and skills to prescribed medical tasks performed in conjunction with the work they had been doing as ambulance driver attendants. This was work which could only be done under medical supervision. Superior had no voice and played no part in the classroom courses, clinical training or practical work experience. It did not determine how many hours the students were to work, when they were to work and did not supervise them or discipline them. Nor, on the evidence before the Board, did Superior set the conditions respecting rates of pay, overtime, shift premium or statutory holidays applicable to the students. Clearly, the students were on work outside of Superior's control. They also were on work outside of the scope of the bargaining unit. The complainant's bargaining rights for the five grievors flow from the collective agreement. Those rights do not extend to the setting of terms and conditions for employment which is beyond the scope of the agreement. Therefore, even if the Board accepts complainant counsel's proposition that Superior's presentation of the terms for renewal of the grievors' leaves of absence is bargaining, insofar as the bargaining was about pay and overtime, conditions, for example, applicable to them as students in the Program, it was not bargaining about conditions coming within the sphere of the complainant's bargaining rights. Therefore it would not be a breach of section 67(1). The same cannot be said for the conditions respecting the accumulation of seniority while on leave and the guarantee of returning to the jobs from which they took leave. Those are conditions which effect both the terms of the collective agreement and rights under the agreement of other employees in the bargaining unit. They are not conditions about which Superior can take unilateral action. Thus were the Board to find that Superior had bargained with the grievors about those conditions, absent consent of the complainant, that bargaining would be in violation of section 67(1).

33. Was Superior bargaining with the grievors when it presented them with terms and con-

ditions in writing for requesting and authorizing the renewal of their leaves of absence? The Board thinks not. It was common ground between Superior and the complainant that the terms and conditions spelled out in the leave renewal document were terms and conditions which had applied during the initial leaves of absence. While the evidence is unclear as to precisely how the complainant and Superior arrived at those terms, the Board is satisfied from the evidence that both parties understood that those were the terms and the conditions which had applied to the grievors during their initial leaves of absence as students in the Program, and the Board so finds. Therefore Superior was simply presenting to the employees terms and conditions for leaves of absence which the complainant had accepted for almost a year. In these circumstances, even if the grievors had signed the requests to renew their leaves of absence, the facts are that no terms or conditions coming within the scope of the complainant's bargaining rights and Superior's bargaining obligations, for example seniority and job protection, would have been altered. There is no evidence that the complainant had sought to bargain with Superior to amend those kinds of terms and conditions for the extended program. So it cannot be said that Superior was making a counter-offer to employees about a bargaining proposal from the complainant. In all of these circumstances, the Board finds that, when Superior presented to the five grievors the terms and conditions for renewing these leaves of absence, it was presenting in written form terms and conditions which had been accepted earlier by the complainant. Superior's conduct was not unlike that of an employer who defines for an employee particular terms and conditions of employment contained in a collective agreement which apply to the employee. Presenting such information to an employee is not bargaining. As a consequence, the Board concludes that Superior did not attempt to bargain directly with the grievors either rates of pay or conditions for leave of absence and did not violate section 67(1) of the Act.

34. With respect to Armstrong's actions, it is patently clear to the Board from the facts of the case that, when he met with students in the Program twice in November and once in each of December and January, he was dealing with the extension of the Program and the conditions which were to apply to graduates if they continued in the Program. The conditions were that the weekly salary they were receiving, which was calculated at 40 hours times the rate of pay applicable to the driver attendant job from which they were on leave, was to be augmented by five per cent and that they would be compensated for overtime and for work on statutory holidays. He told them that the funds for these additional payments were going to be made available by the Ministry for the Program and that they would be flowed through the ambulance operators in the same manner as the funds for the employees weekly salaries and fringe benefit premiums. Armstrong made it clear that those conditions had application only while the employees remained in the Program. The Board has already found the work performed in the Program by employees on leave from Superior is work outside of the scope of the bargaining unit defined in Superior's collective agreement with the complainant and outside of the complainant's bargaining right. Since the terms and conditions which were the subject matter of Armstrong's meetings with the Program participants were the terms and conditions which would apply to graduates remaining in the Program he was dealing with terms and conditions outside of the scope of the complainant's bargaining rights. The letter dated January 7, 1985, which he sent to Program participants and which is alleged to be an offer in writing to one of Superior's employees, in the Board's view, was simply confirmation of what he had told them at the December 20th meeting were to be the conditions available for graduates who continued in the Program. Even were the Board to characterize the letter, as the complainant has, as "... an offer in writing...", it would not be an offer of any terms or conditions within the scope of the complainant's bargaining rights. Therefore it cannot be said that Armstrong was bargaining directly with Superior's employees, whether on his own behalf or on behalf of Superior, contrary to the provisions of section 67(1) of the Act.

35. In summary and in conclusion, for all of the reasons given above, the Board finds on the

facts of this complaint that the respondents Superior Ambulance Limited, R. J. Armstrong and Al Erlenbusch have not violated sections 66 and 67(1) of the Act. In the result, the complaint is dismissed.

CONCURRING OPINION OF BOARD MEMBERS J. P. WILSON AND H. KOBRYN;

1. We concur with the findings of fact and conclusions set out in the decision. We remain concerned, however, with the impact on the employees who participated in the program, particularly the five grievors, resulting from the way in which the parties and the Ministry, through their respective representatives, dealt with the labour relations problems that arose during the Program. We are especially concerned that the five grievors may have to pay up to \$500 as their share of the cost to qualify for re-admission to the Program.

2. It seems to us from the evidence which came before the Board and the facts set out in the decision that the complainant and the Ministry, through their respective representatives, became so focussed on pursuing their own objectives and protecting their own interests that they lost sight of the interests and concerns of the employees who were participating in the Program and those who had left the Program and wanted to return to it. There is no doubt on the evidence that the Program needed the driver attendants if it was to be an effective test of Advanced Life Support services in the Hamilton area. Nor is there any doubt that the five grievors wanted to be part of that test. A greater willingness by the parties and the Ministry to discuss the problems and seek accommodations for them, and less of an inclination to take and defend positions which seem to us to have derived more from the general relationship between the complainant and the Ministry than from their relationships vis a vis the Program alone, might have avoided the predicament in which the five grievors found themselves.

3. In these circumstances, we think it would be a substantial injustice to the five grievors if they have to bear any of the costs of getting re-admitted to the Program.

3150-86-R United Food & Commercial Workers International Union, Applicant v. W. G. Thompson & Sons Limited, Respondent v. Group of Employees, Objectors

Certification - Constitutional Law - Respondent's operations including a feed mill, feed warehouse, and seed cleaning mills - Board not having jurisdiction to hear application - *Canada Wheat Board Act* declaring operations to be works for the general advantage of Canada - Mills and warehouses falling within federal jurisdiction

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Joanne L. McMahon*, *David MacMillan* and *Robert Watson* for the applicant; *Richard Nixon* and *Richard Janda* for the respondent; *Mark B. Coulston*, *David J. Robert* and *John H. Boswell* for the objectors.

DECISION OF THE BOARD; May 20, 1987

1. The name of the respondent is amended to "W. G. Thompson and Sons Limited". (For ease of exposition, the respondent is also referred to in this decision as the "Company".)

2. This is an application for certification in which the respondent has raised a preliminary objection to the constitutional jurisdiction of the Board to hear and determine the application. In this regard, it is the respondent's position that by the provisions of section 45 of the *Canadian Wheat Board Act*, R.S.C. 1970, c. C-12 (the "C.W.B.A."), Parliament has declared that the respondent operates a work for the general advantage of Canada, thereby placing the respondent's operations under federal jurisdiction by virtue of section 92(10)(c) of the *Constitution Act, 1867* (the "*Constitution Act*"). The applicant (also referred to in this decision as the "Union") disputes that position and contends that the Board has jurisdiction to hear and determine this application.

3. Wesley D. Thompson, who has been the President of the respondent since 1951, gave extensive, uncontradicted evidence before the Board concerning the respondent's operations. It is unnecessary to detail his testimony in this decision; it is sufficient for purposes of the present case to summarize some of the facts which emerged from his evidence. The Company's premises in Blenheim are bisected by a set of railway tracks. Its "Hyland Seeds Division" is located on one side of the tracks. That division processes and mills seed corn by dehusking, sorting, drying, shelling, cleaning, sizing, treating, and bagging it. The respondent's seed corn operation also has two warehouses with combined storage space for approximately one hundred thousand 50-pound bags of seed corn. Over 50% of the respondent's seed corn is exported. The rest is sold throughout Canada by the respondent's farm dealer network. In addition to seed corn, the respondent sells a variety of other seeds under the "Hyland" label, including oats, barley, wheat, soya beans, and rape-seed.

4. The respondent operates a feed mill on the other side of the railway tracks. Various grains, including corn, wheat, oats, and barley, are purchased by the respondent from local farmers, and are mixed and milled (by grinding, hammering, or rolling) to produce various feeds for livestock. On that side of the tracks the respondent also operates a feed warehouse, and two seed cleaning mills in which it cleans, grades, sorts, treats, and bags wheat seed, soya beans, and various other seeds. There are four warehouses which operate in conjunction with those seed cleaning mills. There is also a mill in which the respondent cleans, sorts, polishes, and bags white pea beans, red kidney beans, and yellow eye beans, and another mill in which corn, wheat, oats, and barley are weighed, sampled, cleaned, and bagged or stored in bulk. The respondent also cleans and packages wild bird seed. Recently it also began to mill and package popcorn. In describing that part of the respondent's Blenheim operations, Mr. Thompson stated, "The popcorn mill was built in 1986. We've been involved in popcorn since 1983. This is not a major part of our business; it's a sideline....." The respondent's Blenheim operations also include a seed laboratory which is accredited by the Food Production and Inspection Branch of Agriculture Canada to analyze and grade imported field and garden beans, corn, and soya beans, for determining the eligibility for entry into Canada of seed under the *Seeds Act*, R.S.C. 1970, c. S-7.

5. The sole witness called by the applicant was David MacMillan, who was a National Representative for a local of the Brewery Workers Union from 1978 until March of 1986 when he became an International Representative for the applicant. After discussing with an employee the nature of the respondent's operations, Mr. MacMillan considered the matter of whether a certification application should be filed with the Ontario Labour Relations Board or the Canada Labour Relations Board. In deciding to file the application with the Ontario Labour Relations Board, he considered the fact that it had certified the Brewery Workers Union as the bargaining agent for employees of United Co-operatives of Ontario ("U.C.O.") in Cottam and Oldcastle. (He also knew that the U.C.O.'s retail outlet in Kingsville had been provincially certified.) Although his knowledge concerning the nature of the U.C.O.'s operations in Cottam and Oldcastle was quite limited, he knew from driving past them that they had grain elevators and drying facilities. He also knew that they shipped grain to the U.C.O. terminal in Windsor, which he understood to be under

federal jurisdiction because it was located on a waterway. Mr. MacMillan was unable to tell the Board whether or not the U.C.O. has a feed warehouse in Cottam or Oldcastle. It was his understanding that inland facilities were under provincial jurisdiction, and that facilities on a waterway were under federal jurisdiction. Thus, he concluded that the respondent's operations fell under provincial jurisdiction because they were inland. Consequently, he decided to "proceed provincially", and to collect only one dollar from each employee who wished to join the Union, rather than the five dollars required under the provisions of the *Canada Labour Code*.

6. Section 91(29) of the *Constitution Act* gives Parliament exclusive legislative jurisdiction over:

Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

One of the classes of subjects expressly excepted from provincial jurisdiction by section 92(13) is:

(c) Such Works as, although situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

As noted in Hogg, *Constitutional Law of Canada* (2nd Ed., 1985) at page 491, "[t]his 'declaratory power' enables the federal Parliament to assume jurisdiction over a local work by declaring the work to be 'for the general advantage of Canada'." In *Jorgenson v. Attorney General of Canada*, [1971] S.C.R. 725, the Supreme Court of Canada held that a declaration under section 91(10)(c) need not individually specify each work by name or other individual description; works may validly be compendiously brought within federal legislative jurisdiction by a "class" reference, such as that contained in section 45 of the *C.W.B.A.*, which provides:

For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada, and, without limiting the generality of the foregoing, each and every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.

7. Counsel for the applicant submitted that section 45 applies only to the "Western Division" of Canada, as defined in section 2(51) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7 (the "*C.G.A.*"), which provides:

"Western Division" means all that part of Canada lying west of the meridian passing through the eastern boundary of the City of Thunder Bay, including the whole of the Province of Manitoba....

In support of that contention, counsel referred the Board to *Camirand v. The Queen*, [1976] C.S. 1299. In that case, Mr. Justice Mignault of the Quebec Supreme Court held that section 45 only affects mills or warehouses located in the "designated area", as defined in section 2(1) of the *C.W.B.A.*, which provides:

"designated area" means that area comprised by the Provinces of Manitoba, Saskatchewan and Alberta, and those parts of the Province of British Columbia known as the Peace River District and the Creston-Wynndel Areas, and such other parts of the Province of British Columbia and such parts of the Province of Ontario lying in the Western Division as the Board may from time to time designate....

However, as submitted by counsel for the respondent, the reasoning and conclusion of the

Camarand case are inconsistent with the more recent Quebec Superior Court Decision in *Compagnie Du Trust National Ltee c. Burns*, [1985] C.S. 1286. In that case, Madame Justice Mailhot, after reviewing the history of the *C.G.A.* and the *C.W.B.A.* and carefully considering the wording of section 45 of the *C.W.B.A.* in the context of that legislation, concluded that section 45 applies throughout Canada and is not confined to the "designated area". For the reasons set forth below, we respectfully agree with her reasoning and conclusion in that regard.

8. The *C.W.B.A.* is divided into six parts. Part I, which consists of sections 3 to 15, pertains to the composition and powers of the Canadian Wheat Board. Part II, which consists of sections 16 to 23, pertains to "control of elevators and railways". Section 16 explicitly limits the meaning of "grain" in that Part to "grain produced in the designated area" (subject to expansion by regulation, as permitted by section 23). Part III, which consists of sections 24 to 32, pertains to "inter-provincial and export marketing of wheat by the [Canadian Wheat] Board". Many of its provisions are also expressly limited to the "designated area"; see, for example, sections 25, 26, and 27. See also section 32, which empowers the Governor in Council to apply the provisions of that Part (with the exception of section 31) in respect of wheat produced in any area of Canada outside the designated area. Part IV, which pertains to "regulation of inter-provincial and export trade in wheat", is not limited to the "designated area". Part V pertains to "oats and barley", and empowers the Governor in Council to extend by regulation the application of Part III and/or Part IV to oats and/or barley. Section 45 is included in Part VI, which consists of sections 36 to 46. The heading which appears at the beginning of that Part is "GENERAL". There is nothing in that part or elsewhere in the Act which expressly or implicitly limits section 45 to the "designated area". Although all of the mills and warehouses mentioned or described in the schedules are located in Manitoba, Saskatchewan, Alberta, or British Columbia, section 45 expressly stipulates that the legislative declaration of each of those mills or warehouses to be a work for the general advantage of Canada has been made without limiting the generality of the general declaration which precedes it. As noted above, under that general declaration "all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is ... declared to be works or a work for the general advantage of Canada". Having regard to the broad language of section 45 in the context of an act in which a number of other sections have been expressly limited in their geographical scope of operation, we conclude that section 45 applies throughout Canada and is not limited to the aforementioned "designated area" or "Western Division".

9. Our conclusion in that regard is consistent with the interpretation which the Board has given to section 45 of the *C.W.B.A.* in previous cases. See, for example, *Supersweet Formula Feeds*, [1965] OLRB Rep. June 212, in which the Board found that it had no jurisdiction in respect of an employer's feed mill in Milton, Ontario, as it came within the scope of the declaration contained in section 45 of the *C.W.B.A.* See also *Maple Leaf Mills Limited (Komoka Branch)*, [1969] OLRB Rep. Feb. 1177, in which the Board found that, by virtue of section 45 of the *C.W.B.A.*, it was without jurisdiction in a certification application pertaining to an employer's operations in Komoka, Ontario, which included "the operation of a feed manufacture plant, an elevator for the storage of grain products and a seed cleaning and packaging operation".

10. Counsel for the applicant also contended that the respondent's mills and warehouses in Blenheim are not covered by Parliament's section 45 declaration because the respondent works with corn, soya beans, white pea beans, red kidney beans, and yellow eye beans. However, we find no merit in that argument. "Grain", as defined in section 2(1) of the *C.W.B.A.*, "includes wheat, oats, barley, rye, flaxseed and rapeseed" (emphasis added). Thus, it is not limited to the types of grain listed in that non-exclusive definition. Moreover, as submitted by respondent's counsel, the word "grain" does not appear in the declaratory portion of section 45 which, as noted above,

declares all flour mills, feed mills, feed warehouses, and seed cleaning mills to be works for the general advantage of Canada.

11. Counsel for the Union also sought to rely upon two letters dated April 2, 1987 to Mr. MacMillan, which were introduced as exhibits during his testimony. The first, which is from M. Hasson, a Regional Manager with the Employment Standards Branch of the Ministry of Labour, reads as follows:

Dear Mr. MacMillan:

I have received a written inquiry from your solicitor, Ms. Joanne L. McMahon, concerning the application of the Employment Standards Act on feed mills and grain elevators. Ms. McMahon particularly asked me if W. G. Thompson & Sons Limited and its division Hyland Seed in Blenheim, Ontario would fall under the jurisdiction of the Employment Standards Branch.

I wish to advise you that the Employment Standards Branch has exercised jurisdiction on the feed mills and grain elevators which are situated and operated in an inland facility and are not located on a waterway. The operations located on waterways have been designated as federal jurisdiction. I have not physically examined the location of the company in question, however, the aforementioned policy will be criterion in determining provincial or federal jurisdiction.

I trust this information is of assistance to you.

12. The second letter is from T. Casey, the Director of the Ministry of Labour's Industrial Health & Safety Branch. It reads:

Dear Mr. MacMillan:

With respect to my telephone conversation with Ms. Joanne McMahon of Ahee & Associates (representing the United Food & Commercial Workers Union), on March 24, 1987, regarding the governmental jurisdiction for Hyland Seed, Sarnia, the following was found.

Between 1972 and 1978, under an agreement between the federal and the provincial governments, inspections of grain elevators and feed, flour, seed and grain facilities throughout the Province of Ontario were identified under the jurisdiction of the Ministry of Labour (MOL). Federal requests for inspections to be carried out by the MOL ceased in 1978 and Labour Canada assumed responsibility for inspections under the *Canada Grain Act* and the *Canadian Wheat Board Act*.

Through further arrangements made in early 1982, the MOL resumed jurisdictional authority of feed, flour, seed and grain facilities in the Province of Ontario. Those grain elevators situated along waterways and other navigable waters connecting the Great Lakes and the St. Lawrence River remain administered under the *Canada Grain Act* within the jurisdiction of the Federal Government. A review of the file of Hyland Seed, Sarnia, indicates that this company is under provincial jurisdiction.

I trust this information will be of value to you.

13. Counsel for the respondent advised the Board that he did not object to the introduction to those two letters as exhibits on the basis that they were in fact letters received by Mr. MacMillan. However, he submitted that no weight should be given to them as he had no opportunity to cross-examine the writers concerning such matters as to the extent of their knowledge regarding the respondent's operations and regarding section 45 of the *C.W.B.A.*, their qualifications to determine constitutional issues, the legal basis of their conclusions respecting provincial jurisdiction, and other pertinent matters. In the alternative, he submitted that Mr. Hassan's letter deals with only part of the respondent's operations, and makes no mention of its feed warehouses and seed cleaning mills. He further submitted that the first two sentences in the second paragraph of

that letter can be explained on the basis of the declaration contained in section 43(1) of the *C.G.A.*, by which various "elevators" are declared to be for the general advantage of Canada, including (by virtue of section 2(1)(b)) of the *C.G.A.*) "any premises in the Eastern Division, situated along Lake Superior, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario or the canals or other navigable waters connecting those Lakes or the St. Lawrence River or any tidal waters, and into which grain may be received directly from railway cars or ships and out of which grain may be discharged directly to ships". Counsel for the respondent made similar submissions regarding Mr. Carey's letter. In addition, he noted that the letter refers only to "Hyland Seed, Sarnia", and makes no reference to W. G. Thompson and Sons Limited or to Hyland Seed in Blenheim. He also noted that the governmental arrangements referred to in that letter appear to be based on a delegation of administrative authority by the Federal Government to the Provincial Government.

14. Having carefully considered those letters, we do not find them to be of assistance to us in deciding this case. It is evident from the contents of the letters that their writers did not have the benefit of the detailed evidence regarding the respondent's Blenheim operations that was adduced before us in these proceedings, nor is it likely that they had the benefit of extensive legal submissions regarding the pertinent constitutional, statutory, and jurisprudential materials. Thus, it may well be that, as suggested by counsel for the respondent, the administrative division of authority referred to in those letters is based upon the declaration contained in section 43(1) of the *C.G.A.*, and does not take into account the broader declaration contained in section 45 of the *C.W.B.A.*, which we have found to be applicable to the respondent's Blenheim operations. In any event, in the absence of cogent evidence concerning the factual and legal basis of the conclusions set forth in those letters, we do not find them to be helpful in determining the preliminary issue before us in these proceedings.

15. We are also not assisted in deciding this matter by the fact that the respondent complied with a recommendation or direction, contained in a health and safety report, that guards be put on certain belts. It is unclear from the evidence whether that report was prepared by a federal or a provincial health and safety agency. However, even if it is assumed to have been prepared by an official of the Industrial Health and Safety Branch of the Ontario Ministry of Labour, it does not assist us in deciding the constitutional issue which is before us in this case, as the respondent took that action without consulting with legal counsel or otherwise obtaining an informed opinion or determination concerning the agency's constitutional jurisdiction over the respondent's operations.

16. Counsel for the Union also sought to support her client's contention that the respondent's Blenheim operations fall within provincial jurisdiction on the basis of Mr. MacMillan's testimony that the U.C.O. operations in Cottam and Oldcastle were certified by the Board. However, it appears that the Board's jurisdiction with respect to those U.C.O. operations was not disputed. Moreover, the extremely limited evidence which was adduced before us concerning those operations does not enable us to carry out a meaningful comparison between the respondent's operations in Blenheim and the U.C.O. operations in those locations, or to determine whether the U.C.O.'s operations included a flour mill, feed mill, feed warehouse, or seed cleaning mill. (It may be, as suggested by Company counsel, that this Board has jurisdiction over the U.C.O.'s Cottam and Oldcastle operations, but not over its Windsor operations, by reason of the aforementioned declaration contained in section 43(1) of the *C.G.A.* It is unnecessary for purposes of this decision to express any view concerning that matter, which is not before us in these proceedings and could not, in any event, be determined on the basis of the very limited evidence which has been adduced concerning those operations.)

17. Having regard to all of the evidence and the submissions of the parties, we find that the respondent's Blenheim operations include a feed mill, a feed warehouse, and a number of seed

cleaning mills, which, by virtue of section 45 of the *C.W.B.A.*, have been declared by Parliament to be works for the general advantage of Canada. In view of the provisions of sections 91(29) and 92(13) of the *Constitution Act*, those mills and warehouses fall within federal jurisdiction. It is unnecessary to determine whether any part of the respondent's Blenheim operations is not a feed mill, feed warehouse, or seed cleaning mill within the meaning of section 45 of the *C.W.B.A.*, as we are satisfied on the totality of the evidence that all of the respondent's Blenheim operations (with the possible exception of its popcorn mill which, as noted above, is a very minor part of its business) are an integral part of the aforementioned works which have been declared to be for the general advantage of Canada.

18. For the foregoing reasons, we have concluded that we do not have jurisdiction to hear and determine this application. Accordingly, the application is hereby dismissed.

3326-86-FC United Steelworkers of America, Applicant v. Walter Tool and Die Ltd., Respondent

First Contract Arbitration - History of employer unfair labour practices - Employer threatening plant closure - Employer refusing to bargain until employees given a representation vote - Refusal to recognize the bargaining authority of the union forming basis for directing the settlement of a first collective agreement by arbitration

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Peacock*.

APPEARANCES: *Keith Oleksiuk* for the applicant; *Erwin Walter* for the respondent.

DECISION OF THE BOARD; May 1, 1987

1. In a decision dated March 27, 1987 regarding this application under section 40a of the *Labour Relations Act*, the Board wrote as follows:

1. This is an application under section 40a of the *Labour Relations Act* for a direction that a first collective agreement be settled by arbitration.

2. Having regard to all of the evidence and the submissions of the parties, the Board, pursuant to section 40a(2) of the *Labour Relations Act*, hereby directs the settlement of a first collective agreement between the applicant and the respondent by arbitration. Our reasons for this decision will issue at a later date.

Our reasons for issuing that direction are contained in this decision.

2. On June 6, 1986, the Board, differently constituted, certified the applicant as the bargaining agent for "all employees of the respondent in the City of Barrie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff". In an unreported decision dated June 6, 1986 concerning that certification application (Board File No. 0432-86-R), the Board wrote, in part, as follows:

2. This is an application for certification. Although both a complaint under section 89 of the

Labour Relations Act and this application were before the Board at the hearing, the parties agreed that the Board should proceed first with the application for certification.

3. Mr. Erwin Walter, the representative of the respondent, made a preliminary motion by which he submitted that this application be dismissed. He reiterated the submissions made in his statement attached to the respondent's reply. He contended that the unique nature of the respondent's business, the composition of its work force and its training programs made union representation of the majority of its employees wholly inappropriate. After hearing the submissions from the respondent's representative, the Board invited comments from counsel for the objecting employees. Following receipt of those submissions, the Board did not find it necessary to call upon counsel for the applicant and dismissed the motion made by the respondent.

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6. Following the issuance of the Board's ruling with respect to the appropriate bargaining unit, the representative of the respondent indicated to the Board that while he accepted the Board's decision he wished to leave the hearing. The Board advised the respondent's representative that if he did leave, the Board would likely proceed in his absence, unless we were persuaded by him not to. The representative of the respondent agreed that the Board should proceed with this matter after he leaves. However, before leaving, the representative of the respondent asked leave of the Board to make the following statement to the Board at the hearing:

"As of June 15, 1986, Walter Tool and Die Ltd. will cease to exist and will only be consisting of the following employees: two set-up men, two material handlers, and one quality control person for the next period of one year to wind up all its affairs and to fulfill outstanding contracts in the production area. The tool room will continue to work for one year to fulfill its contracts as well as to finish off the apprenticeship of the last apprentice.

I myself will go thereafter in retirement and I am sorry that the jobs which could have been saved for Ontario and this country are lost. I do not believe that it is possible to work with a union affiliated unit because it is against my personal character to do so. I issue this statement now in order to save everyone in this room effort, time and money."

After making that statement, the respondent's representative withdrew from the proceedings.

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10. The Board advised the parties present at the hearing that it appeared to the Board that 24 of the 34 employees in the bargaining unit as of the application date were members of the applicant as of the terminal date. Therefore, the Board was satisfied that more than fifty five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 23, 1986, the terminal date fixed for this application and the date which the Board determined, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. The Board then disclosed to the parties the number of persons who had signed statements in opposition to the applicant and the number of persons who had also signed statements withdrawing their statements in opposition and reaffirming support in the applicant. Counsel for the group of objecting employees asked for a brief recess. Upon counsel's return, counsel for the group of objecting employees advised the Board that after discussions with his clients, and after considering all of the evidence presented to the Board and the statements made by the representative of the respondent during the hearing, his clients had instructed counsel to withdraw their objection to the certification of the applicant. Counsel also suggested that the Board proceed as it saw fit now that the objections to the certification in the applicant had been withdrawn by his clients.

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13. In the absence of any submissions as to why the Board should exercise its discretion pur-

suant to section 7(2) of the Act to order a representation vote, the Board advised the parties present that it was satisfied that it was appropriate in this case to certify the applicant. Therefore, a certificate will issue to the applicant.

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3. The section 89 complaint referred to in that decision and a second section 89 complaint were heard by another panel of the Board on July 2, 1986. In its decision dated July 29, 1986 (reported in [1986] OLRB Rep. Aug. 1167) respecting those complaints (File Nos. 0580-86-U and 0632-86-U), that panel of the Board wrote, in part, as follows:

3. After hearing the evidence and the submissions of the parties the Board issued the following oral decision:

Having heard the evidence, the allegations and the submissions of the parties, the Board finds the respondents [Walter Tool and Die Ltd. and Erwin Walter] and each of them in breach of the Ontario *Labour Relations Act* and specifically sections 64, 66 and 70 thereof and the Board hereby so declares. In addition, the Board orders that the respondents:

- (a) cease and desist from any and all further violations of the Act;
- (b) post copies of the notice to be prepared by the Board, and which shall refer to the rights of workers and obligations of employers and specifically the duty of an employer to bargain in good faith and with the union and make reasonable efforts to achieve a collective agreement, in the usual places and to be delivered by the respondents by regular prepaid first class mail to all persons employed by the respondent as at May 15, 1986;
- (c) grant the complainant reasonable access to the company's premises during working hours for the purposes of holding one meeting with bargaining unit employees;
- (d) pay to each employee who did not request a leave of absence in order to attend at the certification hearing on May 30, 1986 their regular wages for that day;
- (e) forthwith reinstate Earl Devoe to employment and to the position that he held at the time of his layoff on June 15, 1986 with compensation for all lost wages until the date of reinstatement, such compensation to include interest calculated in accordance with the Board's formula;
- (f) forthwith reinstate Mike Leinweber to his employment and to the position that he held at the time of his layoff on June 6, 1986 or to a comparable position if that position is no longer available for just cause, with compensation for lost wages and benefits from the date of layoff to the date of reinstatement, such compensation to include interest calculated in accordance with the Board's formula;
- (g) any compensation to be paid to any person is to be subject to deduction for mitigation by them.

The Board remains seized with any difficulty arising out of the implementation of its decision.

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11. The only evidence heard by the Board was that of Mr. Walter who took the witness stand himself. Mr. Walter candidly and forthrightly admitted and accepted as correct the allegations made by the complainant in Appendix "B" of the complaint as amended. Set out in full, these allegations are as follows:

The complainant states that:

1. On May 12, 1986 the complainant submitted an application for certification for a bargaining unit of employees of the respondent.
2. On May 15, 1986 Steve Banks, an organizer for the complainant, received a call at approximately 9:45 a.m. from Erwin Walter, president of the respondent. Mr. Walter advised Mr. Banks that handicapped employees in the employ of the respondent would be terminated from employment and that temporary employees would be put on layoff. Other employees would be replaced by robots with any remaining employees to be put on salary. Mr. Walter also stated that he would build a plant in the United States of America and close the Barrie facility. Mr. Walter referred to the year 1971 stating that in that year a union organized his business in Toronto and that he closed the plant and sold it. Mr. Walter also advised Mr. Banks that he (Mr. Walter) was going to type a letter and take it to the employees to keep the union out by showing their objection to a union. In addition, Mr. Walter made reference to obtaining the services of a lawyer and beating the union by stalling.
3. On May 15, 1986 Mr. Erwin Walter spoke to Mr. Steve Banks by phone at approximately 12 noon. At that time and in a subsequent telegram on May 15, 1986 to Frank Berry, staff representative of the complainant, Mr. Walter advised the complainant that Mr. Walter intended to hold a vote of employees on May 20, 1986 without the involvement of the Labour Relations Board.
4. On or about May 20, 1986 a letter signed by Mr. Walter was distributed to employees of the respondent. A copy of this letter is attached as Exhibit 1 to this Appendix.
5. On May 23, 1986 the respondent posted a notice in the workplace a copy of which is attached thereto as Exhibit 2 to Appendix "B". In this notice the respondent advised the employees that due to an Application for Certification the respondent was closing down production between 11 p.m. Thursday, May 29th and 11 p.m. Sunday, June 1st.
6. All bargaining unit employees of the respondent were laid off by the respondent without pay from May 29, 1986 at 11 p.m.
7. On or about May 26, 1986 at approximately 8:50 a.m., Mr. Erwin Walter spoke to several employees of the respondent in the lunchroom at the respondent's premises. Mr. Erwin told the employees gathered that he made enough money and could close the respondent's operation at any time.
8. On or about May 28, 1986 bargaining unit employees of the respondent were advised of a lay off effective June 8, 1986.
9. On May 30, 1986 a panel of the Ontario Labour Relations Board convened in Boardroom C to hear the complainant's Application for Certification (Board File: 0432-86-R). The panel of the Board consisted of Mr. H. Freedman, Vice-Chairman of the Board, and members Kobryn and Wightman. Before that panel of the Board and at approximately 2:45 p.m. on May 30, 1986, Mr. Walter who is a principal shareholder of the respondent and who served as the respondent's spokesman, told the Board that the respondent would cease to exist as of June 15, 1986, except for five production

staff who would wind up the business and except for the "tool room", both of which would continue for one year to fulfill contractual and apprenticeship obligations.

10. Mr. Walter further advised that the reason for his decision was that it was not possible for him to work with a union affiliated bargaining unit because it was against his personal character to do so.

The complainant alleges that the action of the respondent constitutes violations of sections 3, 64, 66 and 70 of the *Labour Relations Act*.

12. In addition, Mr. Walter openly stated that he would not negotiate or otherwise deal with the applicant or any other union, that he would reject *any* bargaining proposal made by the complainant, and that, if the complainant were to give up its bargaining rights the company would carry on operating as before and that if it did not the company would be closed down and the company's employees would lose their jobs. He specifically confirmed the statement made in a letter dated May 20, 1986, a copy of which was sent to all employees and to the complainant (Exhibit 6) that "the day a union is certified in Walter Industries [sic] I will cease to be associated with the company in any capacity and will liquidate my investment." In addition, Mr. Walter on several occasions stated that his position was "unshakable" and "immovable".

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17. Having heard the evidence and the submissions of the parties, the Board has no difficulty in concluding that the respondents and each of them is in violation of the Act and specifically sections 64, 66 and 70 thereof.

18. Stating publicly and directly to the employees that the respondents will not deal with the complainant or any other trade union, and indeed the company will close down unless the complainant abandons its bargaining rights and the bargaining unit employees, is a flagrant anti-union position.... There is no room in this province for such conduct or for such threats which are clearly contrary to both the letter and the spirit of the *Labour Relations Act*.

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20. That the uniqueness of the company makes it unsuitable for collective bargaining was an argument made by the respondents in the certification proceedings before this Board to a differently constituted panel (Board File No. 0432-86-R) where it was rejected. Having been previously decided, this issue is not properly raised before the Board in the context of these complaints. There is, in any event, no merit to that argument for the reasons given in the earlier decision.

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26. The Board has considered the assertions of the respondents that Mr. Devoe and Mr. Leinweber were not laid off as a result of any anti-union animus in the light of the admissions that both of them were known to be union organizers, that they were laid off because of a shortage of work even though there was work available for them to do (indeed the very work that Mr. Devoe had been doing immediately prior to his layoff was, at the date of the hearing, being done by someone else) and the attitude of the respondents towards the applicant and trade unions in general as evidenced by the statements and admissions referred to above. It is common in cases such as this for an employer to assert that a termination of employment, however labelled, was not motivated by any anti-union animus. Consequently, the Board is required to draw its own conclusions with respect to the employer's motivation and in so doing must draw inferences from the evidence, including any anti-union posture adopted by the employer. It is also clear that anti-union animus need form only a part of the motivation for the employer's actions (see *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, *DeVilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678, *Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35, *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755, among others). In addition, under section 89(5) of the Act, the onus is on the respondents to satisfy the Board that there was no anti-union animus. The respondents have failed to discharge that onus and, in any event, the Board is satisfied on

the basis of the evidence before it that there was anti-union animus involved in the decision of the respondents to "lay off" both Mr. Devoe and Mr. Leinweber.

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29. After the Board had rendered its oral decision, Mr. Walter made the statement that all that the Board had ordered would be done but that the Board had just shut down the Company. We are constrained to remind Mr. Walter that, upon being given notice to bargain, the Company is required to bargain with the complainant and make every reasonable effort to make a collective agreement. Furthermore, any intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or cease to be a member of a trade union or to refrain from exercising any other rights under the *Labour Relations Act* constitutes a violation of the Act and, if brought before the Board, will be dealt with appropriately.

4. The applicant gave the respondent written notice to bargain, pursuant to section 14 of the Act, by letter dated July 7, 1986 from Frank Berry, the applicant's Regional Representative who was the sole spokesperson for the applicant throughout the bargaining process. Mr. Berry also requested and obtained from the respondent a seniority list and information concerning existing wage rates and benefits. He also forwarded the applicant's collective agreement proposals to Mr. Walter for his perusal prior to the first negotiating session. The respondent, through Mr. Walter, accepted some of the provisions proposed by the applicant and proposed a number of amendments, additions, and deletions.

5. When Mr. Berry attended at the respondent's premises for the purpose of holding a meeting with the bargaining unit employees pursuant to part (c) of the Board order quoted above, Mr. Walter called him into his office and gave him a "Plant Employee Listing" which listed fifteen persons as members of management, two persons as apprentices, and eight persons as bargaining unit employees. During their conversation on that occasion, Mr. Walter told Mr. Berry that the fifteen employees had all been made members of management and would not be in the bargaining unit. He also stated that the two apprentices could not be in the bargaining unit. He further indicated that five of the aforementioned eight persons could not be in the bargaining unit because they were mentally handicapped individuals who had guardians. With respect to the remaining three employees, Mr. Walter told Mr. Berry that although they were then in the bargaining unit, they would be management trainees excluded from the bargaining unit in 1987. After reviewing that list with Mr. Berry, Mr. Walter expressed the view that continued involvement with the respondent's employees would not be financially worthwhile for the applicant as it would not have any members. He also asked Mr. Berry, "Why don't you go away and leave me alone?"

6. After leaving Mr. Walter's office, Mr. Berry went into the plant and invited a number of employees who were operating machines to meet with him. Most of them declined by stating that they were members of management. Only five employees met with Mr. Berry, including one person whom Mr. Berry described as being "very vocally anti-union", some persons whom other employees identified as being mentally handicapped, and a summer student. The student suggested the names of two employees on the other shift as potential members of the union bargaining committee. However, when Mr. Berry learned a few days later that the student had been discharged by the respondent, he decided not to have any employee volunteers participate with him in collective bargaining as he "felt it would jeopardize their jobs and lead to further complications". (We make no finding concerning the legality of that discharge, as that matter is not in issue before us in these proceedings.) Mr. Berry advised Mr. Walter of his decision, and declined Mr. Walter's offer of a second opportunity to meet with employees.

7. The first bargaining session was initially scheduled for September 11. However, Mr. Walter agreed to postpone it for five days at Mr. Berry's request. When they met on September

16, the parties reached agreement on some matters, but were unable to agree on a number of important items, including various aspects of seniority, union security, and the grievance procedure. They were also unable to agree on the respondent's proposal that apprentices be excluded from the bargaining unit and covered by a separate collective agreement. Another major point of contention was the applicant's proposal that persons excluded from the bargaining unit be precluded from performing bargaining unit work. During discussions concerning those proposals, Mr. Berry indicated that he planned to consult with counsel concerning certain matters raised by Mr. Walter. However, Mr. Berry did not subsequently follow through with that plan. After Messrs. Berry and Walter had discussed their respective positions on September 16, Mr. Walter told Mr. Berry that unless the applicant was prepared to abandon its proposal that persons excluded from the bargaining unit be precluded from performing bargaining unit work, there could not be a collective agreement and there would be no sense in having any further bargaining sessions. Mr. Berry understood that to mean that the bargaining session scheduled for October 7 was cancelled. Accordingly, he did not meet with Mr. Walter that day.

8. After carefully considering the situation, Mr. Berry applied for conciliation on October 28. As a result of that application, Conciliation Officer J. Leonard was appointed to confer with the parties and endeavour to effect a collective agreement, pursuant to section 16 of the Act. Mr. Leonard convened a conciliation meeting in Barrie on or about November 27. Mr. Walter was accompanied at that meeting by two employees, who gave Mr. Leonard a petition bearing nine signatures below the following sentence:

We the employees of Walter Tool & Die Ltd. demand to have a free and democratic representation vote which was not given during the time of certification.

Mr. Walter then handed Mr. Leonard the following letter (on the respondent's letterhead), and stated that there would be no negotiations until after a representation vote was taken:

November 27, 1987

Attention: J. Leonard Mediator

Before we even start these contract negotiations and get involved in wasting tax payers money contrary to their wishes to live in a free and democratic society, I would like to make the following statement:

"Since the day that the first persons were approached to sign the union cards as well as during the hearing procedures for certification of the union local, it was shown very clearly that the union nor [sic] the ministry of labour was willing to have a free and democratic vote held by the employees of Walter Tool and Die. The employees approached me many times complaining that they do not have the finances to hire a lawyer and fight the labour relations board and the union.

As long as this representation vote is not held, I consider just as all employees within this company the certification as illegal because it is imposed against the free will of the people.

If a vote is held and it is proven that the employees, by majority, wish to have a union then fair open and honest negotiations will be guaranteed."

(signed) "Erwin F. Walter"

No bargaining occurred that day as Mr. Walter adamantly maintained the position that there would be no further bargaining until a representation vote had been taken.

9. In December, Mr. Walter, another member of management, and some of the employees of the respondent formed a committee for labour law changes and sent a letter to various per-

sons in government requesting that the *Labour Relations Act* be amended to require that a representation vote be taken in all certification applications.

10. By letter dated December 17, 1986, G. R. Thompson, the Deputy Minister of Labour, advised the parties that the Minister had decided not to appoint a conciliation board. No further negotiations occurred between that time and the hearing of this application because Mr. Walter remained steadfast in his position that no bargaining would take place until a representation vote had been taken.

11. In opposing the applicant's request for a direction that a first collective agreement be settled by arbitration, Mr. Walter asserted that there can never be a collective agreement covering the respondent because of the uniqueness of its business. As noted above, that argument was considered and unanimously rejected by the panel of the Board which heard and decided the applicant's certification application. It was also unanimously rejected by the panel which heard the aforementioned section 89 complaints. We are also of the view that this "uniqueness" does not in any way relieve the respondent of its legal obligations under the *Labour Relations Act*. Moreover, section 40a(2) does not give the Board a discretion with respect to directing the settlement of a first collective agreement by arbitration where the process of collective bargaining has been unsuccessful because of one or more of the conditions or circumstances listed in parts (a) to (d). That subsection provides as follows:

The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it *shall* direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

[emphasis added]

Thus, where the process of collective bargaining has been unsuccessful because of one or more of the conditions or circumstances listed in parts (a) to (d), section 40a(2) requires the Board to direct the settlement of a first collective agreement by arbitration. (See, generally, *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005; *Mansour Rockbolting Limited*, [1986] OLRB Rep. Oct. 1346; and *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628.)

12. In the instant case it is abundantly clear that, as contended by counsel for the applicant, the process of collective bargaining has been unsuccessful because of the refusal of the respondent employer to recognize the bargaining authority of the applicant trade union. As noted above, Mr. Walter candidly told the Board panel which heard the aforementioned certification application, "I do not believe it is possible to work with a union affiliated unit because it is against my personal character to do so." During the hearing of the aforementioned section 89 complaints, he openly stated before another panel of the Board that he would not negotiate or otherwise deal with the applicant or any other union, that he would reject any bargaining proposal made by the applicant, and that if the applicant did not give up its bargaining rights, the company would be closed down

and the company's employees would lose their jobs. Any doubt which the respondent's acceptance of some of the applicant's bargaining proposals may have created concerning the continuance of the respondent's refusal to recognize the bargaining authority of the applicant has been completely eradicated by the position adopted by the respondent, through Mr. Walter, in conciliation. As noted above, at the conciliation meeting convened by Mr. Leonard, Mr. Walter stated unequivocally that there would be no negotiations until after a representation vote was taken. Moreover, he continued to steadfastly maintain that position in the intervening period between that conciliation meeting and the hearing of this application.

13. In view of our conclusion regarding the applicability of section 40a(2)(a), it is unnecessary for the Board to determine whether or not the respondent adopted an uncompromising bargaining position without reasonable justification, or failed to make reasonable or expeditious efforts to conclude a collective agreement.

14. For the foregoing reasons, it appeared (and still appears) to the Board, on the basis of all of the evidence and the submissions of the parties, that the process of collective bargaining has been unsuccessful because of the refusal of the respondent employer to recognize the bargaining authority of the applicant trade union. Accordingly, the provisions of section 40a(2) required the Board to direct the settlement of a first collective agreement by arbitration, as we did in the aforementioned decision dated March 27, 1987.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0643-84-R: Canadian Air Line Employees Association (Applicant) v. Emery Air Freight Corporation, c.o.b. as Emery Worldwide (Respondent) v. Group of Employees (Objectors)

Unit: "all office, sales and clerical employees of the respondent excluding outside sales staff, supervisors and above in the Regional Municipality of Peel" (98 employees in unit)

0020-85-R: Canadian Union of Public Employees (Applicant) v. Mississauga Public Library Board (Respondent)

Unit: "all employees of the respondent in Mississauga, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department/branch heads, business manager, secretary to the business manager, secretary to the chief librarian and his/her assistant, payroll/personnel officer and persons above those ranks" (192 employees in unit)

1484-85-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Superior Plumbing & Heating Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (34 employees in unit)

Unit #2: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (34 employees in unit)

0701-86-R: The Canadian Union of Public Employees (Applicant) v. The Umfreville District School Area Board (Respondent)

Unit: "all employees of the respondent working at or out of the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as at June 10, 1986" (8 employees in unit) (*Clarity Note*)

2169-86-R: The Wellington County Board of Education Secretarial/Clerical Association (Applicant) v. The Wellington County Board of Education (Respondent) v. The Canadian Union of Public Employees (Intervener)

Unit: "all secretarial and clerical employees employed by the respondent, save and except supervisors, persons above the rank of supervisor, secretary to the Directors, secretary to Standing Committees, secretary to the Board, secretary to the Superintendent of Finance, secretary to the Superintendent of Administration, secretaries to the Superintendents of Instruction, the employee benefits clerk, the personnel clerk, the secretary to the personnel department, students employed during the school vacation period, students employed pursuant to a co-operative training programme in conjunction with a school, college or university, students

attending school on a full-time basis and any other employees for whom any trade union held bargaining rights as of October 28, 1986" (144 employees in unit) (*Clarity Notes*)

2175-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Burl-Oak Paving Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2446-86-R; 2447-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Caterpillar of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the respondent in Mississauga and Brampton, save and except supervisors, persons above the rank of supervisor, accountants, staff auditors, students employed during the school vacation period and students engaged in a cooperative learning programme" (122 employees in unit)

2687-86-R: United Steelworkers of America (Applicant) v. Canadian Uniform Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Vankleek Hill, save and except forepersons, persons above the rank of foreperson, office and sales staff" (55 employees in unit) (*Having regard to the agreement of the parties*)

2781-86-R: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Ridsdale Steel Fabricators Inc. (Respondent) v. Employee (Objector)

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employment of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2893-86-R: Graphic Communications International Union, Local 500M (Applicant) v. Curwood Packaging (Canada) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Halton Hills, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (93 employees in unit) (*Having regard to the agreement of the parties*)

2906-86-R: St. Catharines Typographical Union, No. 416 (Applicant) v. 570662 Ontario Limited, c.o.b. as We're Econoprint Fast (Respondent)

Unit #1: "all employees of the respondent in St. Catharines, Niagara Falls and Welland, Ontario, save and except the president, the comptroller, the area supervisor, the production supervisor, the art director, one

manager from each branch location and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in St. Catharines, Niagara Falls and Welland, Ontario regularly employed for not more than 24 hours per week, save and except the president, the comptroller, the area supervisor, the production supervisor, the art director and one manager from each branch location" (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3102-86-R: Canadian Union of Public Employees (Applicant) v. The Sutton & District Association for the Mentally Retarded (Respondent)

Unit #1: "all employees of the respondent in Georgina Township, save and except supervisors and those above the rank of supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (*See Applications for Certification Dismissed Without Vote*)

3104-86-R: London & District Service Workers' Union, Local 220, SEIU, AFL:CIO:CLC (Applicant) v. The Corporation of the County of Grey, operating as Grey County Homes for the Aged (Respondent)

Unit #1: "all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Durham, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit)

Unit #2: "all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Durham regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (24 employees in unit)

3189-86-R: United Steelworkers of America (Applicant) v. KRC Rolls (Canada) Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Hawkesbury, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the party*) (*Clarity Note*)

3218-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Crossville Woods Inc. and Westlodge Holdings Inc. (Respondents)

Unit #1: "all construction labourers in the employ of Crossville Woods Inc. and Westlodge Holdings Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all construction labourers in the employ of Crossville Woods Inc. and Westlodge Holdings Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

3233-86-R: United Steelworkers of America (Applicant) v. Hevac Fireplace-Furnace Mfg. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Burlington, save and except foremen, persons above the rank of foreman, office, sales and clerical staff and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

3236-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Keewatin (Respondent)

Unit: "all employees of the respondent in Keewatin, save and except forepersons, persons above the rank of foreperson, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of February 27, 1987" (8 employees in unit) (*Having regard to the agreement of the parties*)

3238-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Humber Mechanical Services Limited (Respondent)

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3262-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same; all employees engaged in survey work; and all construction labourers in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen, party chiefs and persons above the ranks of non-working foreman and party chief" (16 employees in unit)

3270-86-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC, Local 232 (Applicant) v. Goodyear Canada Inc. (Respondent)

Unit: "all employees of the respondent at 9783 Yonge Street, in the Regional Municipality of York, save and except service manager, persons above the rank of service manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

3280-86-R: Ontario Nurses' Association (Applicant) v. St. Mary's of the Lake Hospital (Respondent)

Unit: "all registered and graduate nurses of the respondent at Kingston, employed in a nursing capacity, regularly employed for not more than 24 hours per week, save and except the Sisters, Nurse Clinician, Patient Care Co-ordinator and those above the rank of Patient Care Co-ordinator" (26 employees in unit) (*Having regard to the agreement of the parties*)

3285-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Wild Rose Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices and construction labourers in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3294-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Dufferin (Respondent)

Unit #1: "all employees of the respondent in Dufferin County at Dufferin Oaks, Home for the Aged, save and except supervisors, persons above the rank of supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees for whom any trade union held bargaining rights as of March 6, 1987, being the date of application" (76 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in Dufferin County at Dufferin Oaks, Home for the Aged regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees and employees for whom any trade union held bargaining rights as of March 6, 1987, being the date of application" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #3: "all office and clerical employees of the respondent in Dufferin County at Dufferin Oaks, Home for the Aged, save and except supervisors, persons above the rank of supervisor and secretary to the administrator" (4 employees in unit) (*Having regard to the agreement of the parties*)

3300-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Prefac Industries Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

3302-86-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the Durham Region (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Region of Durham, save and except Supervisors, persons above the rank of Supervisor, Secretaries to the Branch Manager, Department Secretaries, Executive Secretary, Accountants, and students employed during the school vacation period" (85 employees in unit) (*Having regard to the agreement of the parties*)

3312-86-R: Ontario Public Service Employees Union (Applicant) v. B & D Powell Management Ltd. (Respondent)

Unit: "all employees of the respondent at its Arnprior/Kanata Ambulance Service Division in the City of Kanata and Town of Arnprior, save and except the owner-operator, supervisors and those above the rank of supervisor" (21 employees in unit) (*Having regard to the agreement of the parties*)

3325-86-R: International Association of Machinists & Aerospace Workers (Applicant) v. Tobac Curing Systems Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Simcoe, save and except foremen, persons above the rank of foreman, office, technical and sales staff" (40 employees in unit) (*Having regard to the agreement of the party*) (*Clarity Note*)

3334-86-R: International Brotherhood of Electrical Workers, Local 138 (Applicant) v. The Hydro-Electric Commission of the City of Hamilton (Respondent)

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week in Hamilton, save and except temporary employees, probationary employees, students, foremen, superintendents, assistant superintendents, General Manager, Assistant General Manager, Secretary-Treasurer, Chief Engineer, Assistant Chief Engineer, Professional Engineers, Engineers-in-Training, Chief Accountant, Assistant Chief Accountant, Paymaster, Office Manager, Credit Manager, Data Processing Manager, Purchasing Agent, Stores Manager, Customer Service Manager, Customer Service Representatives, Assistant Department Managers, Personnel Manager, Building Superintendent, Garage Manager and Confidential Secretaries" (8 employees in unit) (*Having regard to the agreement of the parties*)

3338-86-R: United Steelworkers of America (Applicant) v. Washington Mills Limited (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3342-86-R: Ontario Public Service Employees Union (Applicant) v. North Bay & District Health Unit (Respondent)

Unit: "all employees of the respondent in the City of North Bay, save and except supervisors, persons above the rank of supervisor, executive secretary, accountant, speech pathologist, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3344-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. Dacon Corporation Limited (Respondent)

Unit: "all employees of the respondent at its KEC Lumber Supply Division in the Township of Kingston, save and except foremen and persons above the rank of foreman, office, clerical and sales staff" (33 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3345-86-R: Canadian Union of Public Employees (Applicant) v. Damascus Daycare Centre Incorporated (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the party*)

3355-86-R: United Steelworkers of America (Applicant) v. Laser International Holdings (1983) Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Hawkesbury, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (41 employees in unit) (*Having regard to the agreement of the parties*)

3360-86-R: Ontario Public Service Employees Union (Applicant) v. Owen Sound Emergency Services Inc. (Respondent)

Unit: "all employees of the respondent at and out of Owen Sound regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except owner-operators" (14 employees in unit) (*Having regard to the agreement of the parties*)

3362-86-R: International Association of Machinists & Aerospace Workers (Applicant) v. Rexnord Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Mathews Conveyor Company Division in the Town of Port Hope, save and except supervisors/foremen and persons above the rank of supervisor/foreman, professional engineers, secretaries to the General Manager and Controller, Plant Manager and Manager of Engineering, students employed during the school vacation period, students employed on a co-operative training program with a school, college or university and persons for whom any trade union held bargaining rights as of March 10, 1987" (84 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3365-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Camo Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and

that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3370-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Oliveira Carpentry Contractors (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

3375-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Zemars Carpenters Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3390-86-R: Ontario Nurses' Association (Applicant) v. North Bay & District Health Unit (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at and out of North Bay, save and except case manager, assistant supervisors, persons above the rank of case manager/assistant supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

3416-86-R: Ontario Public Service Employees Union (Applicant) v. The St. Lawrence Youth Association (Respondent)

Unit: "all employees of the respondent at Kingston, save and except shift supervisors, persons above the rank of shift supervisor and secretary/bookkeeper" (18 employees in unit) (*Having regard to the agreement of the parties*)

3429-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. JVM Carpentry Management Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

3431-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Insite Construction Ltd. Earthmoving & Equipment Rental (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of

palities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3434-86-R: Ontario Nurses' Association (Applicant) v. Regency Manor Limited (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Marnwood House Nursing Home, in Newcastle, save and except Director of Care and persons above the rank of Director of Care" (5 employees in unit) (*Having regard to the agreement of the parties*)

3444-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. Fossco Limited, Manpower Temporary Services Division, Brockville Ontario (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3475-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. S. A. Carpenters (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

3478-86-R: Ontario Nurses' Association (Applicant) v. Brodie Nursing Home Ltd. (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Fruitland, save and except the Director of Resident Care, persons above the rank of Director of Resident Care and persons regularly employed for not more than 24 hours per week" (4 employees per week) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Fruitland who are regularly employed for not more than 24 hours per week, save and except Director of Resident Care and persons above the rank of Director of Resident Care" (4 employees in unit) (*Having regard to the agreement of the parties*)

3479-86-R: Ontario Nurses' Association (Applicant) v. The Municipal Corporation of the County of Hastings (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Village of Bancroft, save and except Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Village

of Bancroft who are regularly employed for not more than 24 hours per week, save and except Director of Nursing and persons above the rank of Director of Nursing" (4 employees in unit) (*Having regard to the agreement of the parties*)

3480-86-R: Ontario Nurses' Association (Applicant) v. Christie Park Nursing Home Ltd. (Respondent)

Unit #1: (see *Applications for Certification Dismissed Without Vote*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Municipality of Metropolitan Toronto who are employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

3493-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 703324 Ontario Limited, c.o.b. as Polar Bear Carpentry (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

3494-86-R: Canadian Union of Public Employees (Applicant) v. Oakville & District Humane Society (Respondent)

Unit: "all employees of the respondent in Oakville, save and except Manager, persons above the rank of Manager, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (10 employees in unit)

3507-86-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Oxford County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Oxford" (45 employees in unit) (*Having regard to the agreement of the parties*)

3508-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. 711617 Ontario Limited, c.o.b. as Vernon Sohan Bulldozing & Grading (Respondent)

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3512-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Allview Lumber Ltd., and Allview Components Inc. (Respondents)

Unit: "all employees of the respondents in the City of Mississauga, save and except foremen, those above the rank of foreman, and sales, office and clerical staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

3526-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. M. Corsi Construction Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0013-87-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Royal Mattress Limited (Respondent)

Unit: "all employees of the respondent in the City of Burlington, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, all persons employed in the retail stores, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

0024-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palisade Homes (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0039-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Vila Verde Carpentry Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0040-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. S. A. Carpentry (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0471-85-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Scarborough (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Scarborough save and except employees in the bargaining units for which any trade union held bargaining rights on May 27, 1985"

Number of names of persons on revised voters' list		183
Number of persons who cast ballots	183	
Number of ballots marked in favour of applicant		153
Number of ballots marked against applicant		30

1293-86-R: Great Lakes Fishermen & Allied Workers Union (Applicant) v. Family Fishery Company (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except Boat Captain and persons above the rank of Boat Captain" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		0

2483-86-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Peel (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit #1: "all employees of the respondent in the Regional Municipality of Peel engaged in the Water Meter repair and installation unit in the Finance Department of the Regional Municipality of Peel save and except the Meter Foreman, those above the rank of Meter Foreman, Clerical, Technical and Inspection staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period or engaged on a semester period, and except all employees in other bargaining units for which other unions are the bargaining agents" (214 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent engaged in the Public Works Department of the Regional Municipality of Peel save and except Foremen, and Area Foremen and those above those ranks, Clerical, Technical and Inspection staff, water pollution control plant foremen, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, or engaged on a semester period, and except all employees in other bargaining units for which other unions are the bargaining agents" (214 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		215
Number of persons who cast ballots	198	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	192	
Number of segregated ballots cast by persons whose names appear on voters' list	6	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		142
Number of ballots marked in favour of intervener		55

2925-86-R: Canadian Union of Public Employees (Applicant) v. Kennedy House Youth Services Inc. (Respondent)

Unit: "all employees of Kennedy House Youth Services Inc. in Ajax, save and except supervisors, persons above the rank of supervisor, secretary to the superintendent and Clinical co-ordinator" (25 employees in unit)

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		8

2926-86-R: The Canadian Union of Public Employees (Applicant) v. Beaver Foods Limited (Respondent)

Unit: "all employees of the respondent at Trent University, Peterborough, save and except supervisors, persons above the rank of supervisor, and office staff" (102 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons on revised voters' list		102
Number of persons who cast ballots	67	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		31

3247-86-R: Canadian Paperworkers Union (Applicant) v. St. Marys Paper Inc. (Respondent)

Unit: "All employees of St. Marys Paper Inc. in Sault Ste. Marie engaged in office work at the mill and woods office as listed on Schedule A" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots		32
Number of ballots marked in favour of applicant		29
Number of ballots marked in favour of intervener		3

3248-86-R: Canadian Paperworkers Union (Applicant) v. St. Marys Paper Inc. (Respondent)

Unit: "all employees of St. Marys Paper Inc. at Sault Ste. Marie, save and except forepersons, persons above the rank of foreperson, office, clerical, engineering and sales staff, and persons for whom any trade union held bargaining rights as of March 2, 1987" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		6
Number of ballots marked in favour of Association		0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1293-86-R: Great Lakes and Allied Workers' Union (Applicant) v. Family Fishery Company (Respondent)

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except Boat Captain and persons above the rank of Boat Captain" (6 employees in unit)

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		0

2756-86-R: Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Limited (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent in its nursing home at St. Thomas, regularly employed for not more than 24 hours per week, save and except the Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

3061-86-R: Canadian Union of Public Employees (Applicant) v. The Orthopaedic & Arthritic Hospital (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto save and except Professional Medical Staff, Registered, Graduate and Undergraduate Nurses, Paramedicals, office and clerical employees, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and persons for whom any trade union held bargaining rights" (104 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on voters' list at start of vote		104
Number of persons who cast ballots	86	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		59
Number of ballots marked against applicant		26

Applications for Certification Dismissed Without Vote

2388-85-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Stone & Webster Canada Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (13 employees in unit)

2386-86-R: Energy & Chemical Workers Union (Applicant) v. Mobil Chemical Canada, Ltd. (Respondent)

Unit: "all employees of the respondent in Belleville, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period" (23 employees in unit)

2503-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. Anton Vukovic, c.o.b. as A. Vukovic Forming Co. (Respondent) (11 employees in unit)

3078-86-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Fish Construction (Respondent) (3 employees in unit)

3102-86-R: Canadian Union of Public Employees (Applicant) v. The Sutton & District Association for the Mentally Retarded (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in Georgian Township regularly employed for not more than 24 hours per week and students employed during the vacation period, save and except managers and those above the rank of manager, and office and clerical employees" (18 employees in Unit)

3204-86-R: Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261 (Applicant) v. Fratcom Resources, c.o.b. as Beacon Arms Hotel (Respondent) (7 employees in unit)

3232-86-R: United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Sears Canada Inc. (Respondent) v. Group of Employees (Objectors) (218 employees in unit)

3268-86-R: International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 736 (Applicant) v. Terence A. Jamieson Co. (Respondent)

Unit: "all ironworkers, ironworker apprentices, and welders engaged in the erection of structural steel in the Ontario Labour Relations Board geographic areas 5 and 6" (15 employees in unit)

3269-86-R: Labourers' International Union of North America, Local 837 (Applicant) v. Roman Cheese Products Limited (Respondent) v. Joe Iantomasi (Objector) (28 employees in unit)

3392-86-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Sketchley Cleaning Services Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 2346 Yonge Street, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

3419-86-R: United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. The Rose Corporation (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (8 employees in unit)

3441-86-R: Ontario Public Service Employees Union (Applicant) v. Queen's University (Respondent) v. Canadian Union of Public Employees (Intervener) (660 employees in unit)

3480-86-R: Ontario Nurses' Association (Applicant) v. Christie Park Nursing Home Ltd. (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0731-84-R: Ontario Public Service Employees Union (Applicant) v. Board of Education for the City of North York (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the City of North York, save and except persons covered by subsisting collective agreements" (297 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		240
Number of persons who cast ballots	73	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		49
Ballots segregated and not counted		2

3308-86-R: Service Employees Union, Local 219 (Applicant) v. Ketchum Manufacturing Sales Limited (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and sales staff" (25 employees in unit)

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		7

Number of ballots marked against applicant

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Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1851-86-R: International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. Jette Pedersen, c.o.b. under the firm name and style of Gallant Painting (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Sarnia, Moore Township and Sarnia Township, save and except sales, office and clerical staff, foremen and those above the rank of foreman" (28 employees in unit)

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		14

1993-86-R: United Steelworkers of America (Applicant) v. BIMAC Canada Metallurgical Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Burlington, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff" (45 employees in unit)

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	44	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	41	
Number of segregated ballots cast by persons whose names appear on voters' list	3	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		24

2143-86-R: The International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. James Kemp Construction Limited (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		3

2368-86-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Kimco Steel Sales Limited (Respondent)

Unit: "all employees of the respondent in the City of Kingston, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (29 employees in unit)

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	31	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	28	
Number of segregated ballots cast by persons whose names appear on voters' list	1	

Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		18

2811-86-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Can Mar Manufacturing Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except forepersons, persons above the rank of foreperson, office, clerical, and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (31 employees in unit)

Number of names of persons on revised voters' list		26
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		17
Ballots segregated and not counted		1

3116-86-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coreslab Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Burlington, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, brokers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit)

Number of names of persons on list as originally prepared by employer		34
Number of persons who cast ballots	34	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		19

Applications for Certification Withdrawn

0628-84-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent)

1921-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. LTL Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

2667-86-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Sault Ste. Marie Board of Education (Respondent)

3089-86-R: Service Employees Union, Local 183 (Applicant) v. Carewell Campbellford Nursing Home (Respondent) v. Carewell Campbellford Employee's Association (Intervener)

3313-86-R: Ontario Public Service Employees Union (Applicant) v. Consolidated Maintenance Services Limited (Respondent)

3339-86-R: United Steelworkers of America (Applicant) v. Orangeroo Group Inc. (Respondent)

3356-86-R: United Steelworkers of America (Applicant) v. Deslaurier Custom Cabinets Inc. (Respondent)

3359-86-R: United Food & Commercial Workers International Union (Applicant) v. Coca-Cola Foods Canada Inc. (Respondent)

3476-86-R: Labourers' International Union of North America, Local 493 (Applicant) v. Ethier Sand & Gravel Limited (Respondent)

3575-86-R: Service Employees Union, Local 183 (Applicant) v. Drossbach N.A. Inc. (Respondent)

0053-87-R: Canadian Union of Public Employees (Applicant) v. Toronto General Hospital (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2728-86-FC: United Food & Commercial Workers International Union (Applicant) v. Formula Plastics Inc. (Respondent) (*Granted*)

3326-86-FC: United Steelworkers of America (Applicant) v. Walter Tool & Die Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1647-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. Stewart & Hinan Construction Limited, Stewart & Hinan Contractors Limited, Stucor Construction Ltd., Resource Equipment Limited (Respondents) (*Dismissed*)

2780-85-R; 2781-85-R: Sheet Metal Workers' International Association, Local Union 47 (Applicant) v. Irving Contracting Limited, Alexander Metal Products (1965) Limited, and National Roofing Inc. (Respondent) (*Dismissed*)

2361-86-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Francon, division of Canfarge Ltd; Permanent Concrete, division of Canfarge Ltd. (Respondents) (*Withdrawn*)

2371-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Hearn Stratton Construction Ltd., Appleton Construction Ltd. and 663732 Ontario Limited (Respondents) (*Granted*)

2494-86-R: International Ladies Garment Workers' Union (Applicant) v. H.L.S. Dress & Exclusive Dress Company Limited, and Exclusive Dress International Limited (Respondents) (*Granted*)

2539-86-R: Labourers' International Union of North America, Local 625 (Applicant) v. R. C. Pruefer Co. Limited, and Rose-Ville Gardens of Windsor Limited (Respondents) v. Construction Workers Local 53, affiliated with The Christian Labour Association of Canada (Intervener) (*Granted*)

2540-86-R: International Union of Bricklayers & Allied Craftsmen, Local 6 (Applicant) v. R. C. Pruefer Co. Limited, and Rose-Ville Gardens of Windsor Limited (Respondents) v. Construction Workers Local 53, affiliated with The Christian Labour Association of Canada (Intervener) (*Granted*)

3218-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Crossville Woods Inc., and Weslodge Holdings Inc. (Respondents) (*Granted*)

3513-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Allview Lumber Ltd., and Allview Components Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

1647-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. Stewart & Hinan Construction Limited, Stewart & Hinan Contractors Limited, Stucor Construction Ltd., Resource Equipment Limited (Respondents) (*Granted*)

0217-86-R: United Food & Commercial Workers International Union, Locals 175 and 633 (Applicant) v. New Dominion Stores Inc., The Great Atlantic & Pacific Company of Canada Limited (Respondents) (*Granted*)

2360-86-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

Local 230 (Applicant) v. Francon, division of Canfarge Ltd., and Permanent Concrete, division of Canfarge Ltd. (Respondent) (*Withdrawn*)

2371-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Hearn Stratton Construction Ltd., Appleton Construction Ltd., and 663732 Ontario Limited (Respondents) (*Dismissed*)

2487-86-R: United Steelworkers of America (Applicant) v. Canada Machinery Corporation (Respondent) v. International Association of Machinists & Aerospace Workers, Local 1740 (Intervener) (*Granted*)

2624-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. R.A. Hume & Sons Contractors Limited; Hume Contractors Ltd.; Robert Hume Construction Ltd. (Respondents) (*Withdrawn*)

2780-86-R; 2781-86-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Irving Contracting Limited, Alexander Metal Products (1965) Limited and National Roofing Inc. (Respondents) (*Dismissed*)

3495-86-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 681638 Ontario Ltd., c.o.b. as Landmark Inn, Thunder Bay, and Nu-West Development Corporation (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3117-85-R: Kurt Prisor (Applicant) v. United Brotherhood of Carpenters & Joiners of America (Respondent)

Unit: "all journeymen and apprentice carpenters employed by Berkim Construction Ltd., other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		6

2020-86-R: Paul Petrus (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 3054 (Respondent) (*Withdrawn*)

2634-86-R: Michael Ostner, on behalf of a Group of Employees of the Brick Brewing Co. Limited (Applicant) v. United Food & Commercial Workers International Union, Local 173W (Respondent) v. Brick Brewing Co. Limited (Intervener)

Unit: "all employees of Brick Brewing Co. Limited at Waterloo, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, and employees covered under the part-time collective agreement" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

2641-86-R: Thérèse Laframboise (Applicant) v. Service Employees Union, Local 219 (Respondent) v. Domus Building Cleaning Co. Ltd. (Intervener)

Unit: "all employees of the intervener at the University of Ottawa, save and except resident manager, persons above the rank of resident manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (77 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	77
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Number of persons who cast ballots	47	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		11
Number of ballots marked against respondent		35

2798-86-R: Paul W. Mountain (Applicant) v. International Brotherhood of Electrical Workers, Local 636 (Respondent) v. The Corporation of the Town of Milton (Intervener)

Unit: "all employees of its Parks & Recreation Department, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week, students employed on a co-operative training programme, and persons covered by a subsisting collective agreement between the Corporation and Union" (12 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		11

2844-86-R: Bruno Fiorini (Applicant) v. United Steelworkers of America, District #6 (Respondent) v. Rembrandt Jewelry Manufacturing, division of Johnson Matthey Limited (Intervener) (*Dismissed*)

2978-86-R: Rosario Toppi (Applicant) v. United Steelworkers, Local 5264 (Respondent) v. W. A. Coleman Metal Products Ltd. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of W. A. Coleman Metal Products Ltd., in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (42 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	37	
Number of ballots marked in favour of respondent		19
Number of ballots marked against respondent		18

3069-86-R: J. Graeme Fraser (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, and its Local 414 (Respondent) v. Black Photo Corporation v. Group of Employees (Objectors)

Unit: "all persons employed by the intervener in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor and office staff" (132 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		132
Number of persons who cast ballots	126	
Number of ballots marked in favour of respondent		57
Number of ballots marked against respondent		69

3095-86-R: Ana Paula Costa (Applicant) v. Fur Workers' Union, Local 82, affiliated with United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Fursyn Manufacturing Ltd. (Intervener)

Unit: "all employees of Fursyn Manufacturing Ltd., at its plant at 5 Defries Street, Toronto, Ontario, save and except forepersons, employees above the rank of foreperson, office staff, sales staff, and employees regularly employed for not more than 24 hours per week, and students" (22 employees in unit) (*Granted*)

3135-86-R: Henry Fraser (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 397 (Respondent) v. G.B.F. Forging Specialists Co. (Intervener) (25 employees in unit) (*Granted*)

3173-86-R: James Wright (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Respondent) v. Coca-Cola Ltd. (Intervener) (*Dismissed*)

3192-86-R: Bruce McTeer (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied

Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Wark Milk Transport Limited (Intervener) (14 employees in unit) (*Granted*)

3329-86-R: Daniel LeFebvre (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 427 (Respondent) (7 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0123-87-U: Hamilton Automatic Vending Co. Limited (Applicant) v. United Cement, Lime Gypsum & Allied Workers, division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers and its Local 576 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1889-85-U: Allan Hagan (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38, and Douglas Putman, Business Representative (Respondents) (*Dismissed*)

2307-85-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Andre Roy, and Labourers' International Union of North America, Local 527 (Respondents) (*Granted*)

0509-86-U: Lawrence R. Ronne (Complainant) v. United Brotherhood of Carpenters of America, Local 494 (Respondent) (*Withdrawn*)

0754-86-U: Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 172 (Complainant) v. Belair Restoration (Ontario) Inc. (Respondent) (*Dismissed*)

1526-86-U: Zdenka Sedlacek (Complainant) v. N & D Supermarket Employees' Association, and N & D Supermarket Limited (Respondents) (*Withdrawn*)

1527-86-U: Alice Groulx (Complainant) v. N & D Supermarket Employees' Association, and N & D Supermarket Limited (Respondents) (*Withdrawn*)

1570-86-U: Toronto Typographical Union, Local 91 (Complainant) v. Fitzhenry & Whiteside Ltd. (Respondent) (*Withdrawn*)

2179-86-U: Raymond McLeod (Complainant) v. Camco Inc., and United Electrical, Radio & Machine Workers of Canada (UE), Local 550 (Respondents) (*Granted*)

2290-86-U: Vincent McManus (Complainant) v. Professional & Clerical Workers of Canada (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener) (*Dismissed*)

2488-86-U: Canadian Union of Public Employees, Local 3114 (Complainant) v. Creedan Valley Nursing Home (Respondent) (*Withdrawn*)

2544-86-U: Elizabeth Balanyk (Complainant) v. Ontario Nurses' Association, Beth Symes, and Members of ONA (Respondents) v. Greater Niagara General Hospital (Intervenor) (*Withdrawn*)

2572-86-U: Gerald P. Moos (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (CAW), Local 195, (Respondent) (*Withdrawn*)

2589-86-U: Elphee Joseph Trottier (Complainant) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Respondent) v. Mitsubishi Electronics Industries Canada Inc. (Intervener) (*Dismissed*)

2605-86-U: William James Tearse (Complainant) v. CUPE, Local 2497 (Respondent) (*Dismissed*)

2610-86-U: Theogene Guignard (Complainant) v. International Union of United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Local 444, and Chrysler Canada (Respondent) (*Withdrawn*)

2613-86-U: Lorne Keith (Complainant) v. Teamsters Union, Local 141 (Respondent) (*Withdrawn*)

2617-86-U; 2618-86-U: Gregory Barrett (Complainant) v. Blue Line Taxi Ltd. (Respondent) v. The Corporation of the City of Ottawa (Intervener) (*Dismissed*)

2630-86-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Cambridge Canadian Foods (Respondent) (*Withdrawn*)

2643-86-U: Toronto Typographical Union, Local 91 (Complainant) v. Fitzhenry & Whiteside Ltd. (Respondent) (*Withdrawn*)

2723-86-U: Teamster Union, Local 141, affiliated with International Brotherhood of Teamster, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Moffatt & Powell Limited (Respondent) (*Withdrawn*)

2804-86-U: Fitzhenry & Whiteside Limited (Complainant) v. Toronto Typographical Union, Local 91, and Nelson Roland (Respondents) (*Dismissed*)

2810-86-U: United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 68F (Complainant) v. Reliable Fur Dressers & Dyers Limited (Respondent) (*Withdrawn*)

2858-86-U: Association of Allied Health Professionals, Ontario (Complainant) v. Etobicoke General Hospital (Respondent) (*Dismissed*)

2943-86-U: Ontario Public Service Employees Union, Local 565 (Complainant) v. York-Finch General Hospital (Respondent) (*Granted*)

3020-86-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Complainant) v. Maclean's Magazine (Respondent) (*Withdrawn*)

3035-86-U: International Brotherhood of Electrical Workers, Local 2228 (Complainant) v. Nortec Air Conditioning Industries Ltd. (Respondent) (*Withdrawn*)

3053-86-U: John Reay (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

3055-86-U: Gaston Fortin (Complainant) v. Alan McMahon, President Local 109, CPU (Respondent) (*Withdrawn*)

3085-86-U: Paul Sullivan (Complainant) v. Labourers International Union of North America, Local 506 (Respondent) (*Withdrawn*)

3092-86-U: Barbara Wordock (Complainant) v. Amalgamated Clothing & Textile Workers Union, Local 1070T, AFL:CIO:CLC, South-Western Ontario Textile Joint Board (Hamilton), and Glendale Spinning Mills (1981) Ltd. (Respondents) (*Withdrawn*)

3136-86-U: Joseph Dickinson (Complainant) v. Smart Turner Limited, Smart Turner Employees Association, Phillip Thain and John Jones (Respondents) (*Withdrawn*)

3166-86-U: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Complainant) v. Hearn Stratton Construction Ltd., Appleton Construction Ltd., and 663732 Ontario Ltd. (Respondents) (*Withdrawn*)

- 3183-86-U:** International Brotherhood of Electrical Workers, Local 2228 (Complainant) v. Nortec Air Conditioning Industries Ltd. (Respondent) (*Withdrawn*)
- 3213-86-U:** Kiril Argiloff (Complainant) v. John Wood Ltd. (Respondent) (*Withdrawn*)
- 3246-86-U:** Fraternité Inter-Provinciale des Ouvriers en Electricité (F.I.P.O.E.) (Complainant) v. Pace Safety Systems Eastern (Respondent) (*Withdrawn*)
- 3263-86-U:** Ontario Public Service Employees Union (Complainant) v. Centennial College of Applied Arts & Technology (Respondents) (*Withdrawn*)
- 3272-86-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. VME Equipment of Canada Ltd. (Guelph, Ontario) (Respondent) (*Withdrawn*)
- 3277-86-U:** Canadian Union of Public Employees, Local 2101 (Complainant) v. Sheridan Villa Home for the Aged, Regional Municipality of Peel (Respondent) (*Withdrawn*)
- 3288-86-U:** Service Employees Union, Local 183 (Complainant) v. Carewell Campbellford Nursing Home (Respondent) v. Carewell Campbellford Employees' Association (Intervener) (*Withdrawn*)
- 3293-86-U:** United Steelworkers of America (Complainant) v. Hevac Fireplace Furnace Mfg. Ltd. (Respondent) (*Withdrawn*)
- 3297-86-U:** Suzanne Pilon (Complainant) v. Service Employees International Union, Local 268 (Respondent) (*Withdrawn*)
- 3306-86-U:** Anthony Carvalho (Complainant) v. Christine Polosak (Respondent) (*Dismissed*)
- 3307-86-U:** Everette Chapelle (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) (*Withdrawn*)
- 3317-86-U:** Service Employees Union, Local 183 (Complainant) v. Carewell Campbellford Nursing Home (Respondent) (*Withdrawn*)
- 3331-86-U:** Jane Stewart (Complainant) v. CUPE, Local 1263 (Respondent) (*Withdrawn*)
- 3336-86-U:** Service Employees International Union, Local 204 (Complainant) v. Dalhousie Retirement Home Ltd. (Respondent) (*Withdrawn*)
- 3351-86-U:** Paul Douglas Munro (Complainant) v. Representatives of Lime, Gypsum, Boilermakers & Chemical Workers Union - John Sprat, Mike Crowley (Respondents) (*Withdrawn*)
- 3379-86-U:** Service Employees Union, Local 183 (Complainant) v. Drossback N.A. Inc. (Respondent) (*Withdrawn*)
- 3380-86-U:** Canadian Union of Public Employees (Complainant) v. The Chatham Water Commission (Respondent) (*Dismissed*)
- 3391-86-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Gaston H. Poulin Contractor Limited (Respondent) (*Withdrawn*)
- 3424-86-U:** Nellis Waugh, L.U. Local 1563 I.B.E.W. (Complainant) v. Square D Canada Electrical Equipment, Ltd. (Respondent) (*Withdrawn*)
- 3455-86-U:** Rita Marrazzo (Complainant) v. Bell Canada (Respondent) (*Dismissed*)

3465-86-U: Marshall Davison (Complainant) v. Retail, Wholesale & Department Store Union, Local 414, Domgroup Ltd., and Willett Foods Ltd. (Respondents) (*Withdrawn*)

3466-86-U: Randy H. Revie (Complainant) v. Region of Peel (Roads & Traffic) (Respondent) (*Withdrawn*)

3467-86-U: Linda D. Yalor (Complainant) v. CUPE, Local 16 (Respondent) (*Withdrawn*)

3468-86-U: Linda D. Taylor (Complainant) v. Board of Education, and Mr. Healy (Respondents) (*Dismissed*)

3469-86-U: Linda D. Taylor (Complainant) v. Mr. Connely (Respondent) (*Dismissed*)

3470-86-U: Linda D. Taylor (Complainant) v. Mrs. Curuso (Respondent) (*Dismissed*)

3474-86-U: Ontario Sheet Metal Workers' Conference (Complainant) v. Imperial Insulation & Roofing (1982) Ltd. (Respondent) (*Withdrawn*)

3497-86-U: Rosa Carrascalao (Complainant) v. Arthur Carreiro (Respondent) (*Dismissed*)

3519-86-U: Frank Petch (Complainant) v. Welles Corporation Ltd., and Walt Lozinski (Plant Committeeman) (Respondents) (*Withdrawn*)

3576-86-U: United Food & Commercial Workers, Local 175 (formerly Local 206), chartered by United Food & Commercial Workers' International Union (Complainant) v. General Latex & Chemicals Limited (Respondent) (*Withdrawn*)

0031-87-U: Sheila Murray & Donna Peever (Complainant) v. United Food & Commercial Workers Union, Local 206 (Respondent) (*Withdrawn*)

0035-87-U: Gordon Demianchuk (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) (*Withdrawn*)

0042-87-U: Herman Hubers (Complainant) v. Amalgamated Clothing & Textile Workers Union (Respondent) (*Withdrawn*)

0047-87-U: Ida Banton (Complainant) v. H.R.E.R., Local 75 (Respondent) (*Dismissed*)

0142-87-U: Hamilton Automatic Vending Company Limited (Complainant) v. United Cement, Lime, Gypsum & Allied Workers, division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 576 (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2805-86-U: Fitzhenry & Whiteside Limited (Applicant) v. Toronto Typographical Union, Local 91, and Nelson Roland (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3167-86-M: Textile Rental Institute of Ontario, by and on behalf of Canadian Linen Supply Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

3340-86-M: Work Wear Corporation of Canada Ltd. (Waterloo division) (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

3354-86-M: Textile Rental Institute of Ontario, by and on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Services, and London Hospital Linen Service (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

2712-85-JD: Ontario Sheet Metal Workers' Conference & Sheet Metal Workers' International Association, Local 30 (Complainants) v. Electrical Power Systems Construction Association, Ontario Hydro, International Association of Bridge, Structural & Ornamental Ironworkers Local 721, and International Brotherhood of Boilermakers Local 128 (Respondents) (*Dismissed*)

2136-86-JD: Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Complainants) v. COSMA, division of Magna International Inc., Millwrights Unlimited, Association of Millwrighting Contractors of Ontario Inc., United Brotherhood of Carpenters & Joiners of America, Millwrights Local Union 1916, and Mechanical Contractors Association of Ontario (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0731-86-M: Board of Governors of Ryerson Polytechnical Institute (Applicant) v. Ontario Public Service Employees Union, Local 596 (Respondent) (*Withdrawn*)

1932-86-M: United Steelworkers of America (Applicant) v. Ivaco Rolling Mills, division of Ivaco Inc. (Respondent) (*Dismissed*)

2832-86-M: Association of Allied Health Professionals, Ontario (Applicant) v. Wellesley Hospital (Respondent) (*Withdrawn*)

3200-86-M: Canadian Union of Public Employees, Local 791 (Applicant) v. Corporation of the City of Kitchener (Respondent) (*Withdrawn*)

3212-86-M: Canadian Union of Public Employees, Local 2063 (Applicant) v. Toronto Jewish Congress (Respondent) (*Withdrawn*)

3462-86-M: Southern Ontario Newspaper Guild (Applicant) v. Maclean's Magazine (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

3075-85-OH: Madeleine Cloutier (Complainant) v. Lanny Elliott, Pat Taylor, and Ron Westworth (Respondents) (*Dismissed*)

1563-86-OH: Salvatore Rosa, et al. (Complainants) v. Mario Iaquina, Ken Desjardins and Windsor Bumper (division of Wickes Manufacturing Company), Windsor (Respondents) (*Dismissed*)

2596-86-OH: William Wilhelm (Complainant) v. Ray Jenkins (Respondent) (*Withdrawn*)

2709-86-OH: Michelle Ouellette (Complainant) v. First Choice Haircutters (Respondent) (*Withdrawn*)

2765-86-OH: Richard Levergood (Complainant) v. Kelsey-Hayes Canada Ltd. (Respondent) (*Withdrawn*)

3187-86-OH: Sheet Metal Workers' International Association, Local 540, and Bruce Hogg (Complainants) v. S. W. Fleming Limited (Respondent) (*Withdrawn*)

3276-86-OH: Canadian Union of Public Employees, Local 2101 (Complainant) v. Sheridan Villa Home for the Aged, Regional Municipality of Peel (Respondent) (*Withdrawn*)

3318-86-OH: Canadian Union of Public Employees, Local 2934 (Thunder Bay Program) (Complainant) (*Withdrawn*)

3433-86-OH: Richard John Romanoff (Complainant) v. Probart Motors Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2782-85-M: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Irving Contracting Limited, Alexander Metal Products (1965) Limited, and National Roofing Inc. (Respondents) (*Dismissed*)

3000-85-M: Labourers' International Union of North America, Local 183 (Applicant) v. Mo-Ca Drain & Concrete Ltd. (Respondent) (*Granted*)

0717-86-M: International Association of Bridge, Structural & Ornamental Iron Workers (Applicant) v. Electrical Power Systems Construction Association & Ontario Hydro (Respondents) (*Granted*)

1352-86-M: Labourers' International Union of North America, Local 1089 (Applicant) v. Ellis Don Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 1256 (Intervener) (*Withdrawn*)

2081-86-M: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 4, Ontario (Applicant) v. Plibrico (Canada) Limited (Respondent) (*Dismissed*)

2542-86-M: International Union of Bricklayers & Allied Craftsmen, Local 6 (Applicant) v. R. C. Pruefer Co. Limited, and Rose-Ville Gardens of Windsor Limited (Respondents) (*Granted*)

2548-86-M: United Brotherhood of Carpenters' & Joiners of America, Local 27 (Applicant) v. A. MacDenzie & Associates (Respondent) (*Granted*)

2680-86-M: International Brotherhood of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Canadian Steeplejacks Ltd. (Respondent) (*Granted*)

3007-86-M: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. 601758 Ontario Inc., c.o.b. as Blandford Insulation 1984 (Respondent) (*Granted*)

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3080-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. F. Ferri Carpenters Ltd. (Respondent) (*Withdrawn*)

3093-86-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Clow Darling (Respondent) (*Withdrawn*)

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- 3461-86-M:** International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)
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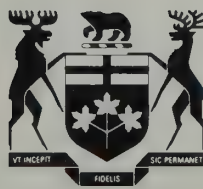
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ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1987



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1987] OLRB REP. JUNE

EDITOR: COLLEEN EDWARDS

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- Pre-Hearing Vote - Bargaining Unit - Certification - Problems with identifying employees in the voting constituency in applications involving occasional teachers - When application of *York* test places teacher in more than one unit, teacher falls in unit to which s/he has the greatest attachment - Voting arrangements made for occasional teachers - Earlier application for certification of educational assistants to be considered with this application after vote
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- Related Employer - Bargaining Rights - Collective Agreement - Construction Industry - Sale of a Business - Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit - *Nicholls-Radtke* distinguished - Employer had no present or future need for employees when collective agreement signed - No valid collective agreement - Sale and related employer issues academic - Application dismissed
- EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD
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- Representation Vote - Build-Up - Certification - Terminal date extended following change in bargaining unit description - Application made during pea-picking season - Work force expected to expand during corn season - Whether representation vote should be ordered - Employees on the application date "representative" of the employer's employment environment - Vote unnecessary - Certificate issuing
- COBI FOODS INC.; RE U.F.C.W. 815
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VIII

- constituency both on date vote is ordered and date vote is held in construction industry termination vote - "At work in" requiring physical presence at work - Employee need not be at work in the voting constituency between the two material dates to be eligible to vote - Bargaining rights terminated
- CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE THE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 810
- Sale of a Business - Bargaining Rights - Collective Agreement - Construction Industry - Related Employer - Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit - *Nicholls-Radtke* distinguished - Employer had no present or future need for employees when collective agreement signed - No valid collective agreement - Sale and related employer issues academic - Application dismissed
- EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687..... 833
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- CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE THE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 810
- Termination - First Contract Arbitration - Practice and Procedure - Termination application filed the day before the Board issued a decision directing settlement of a first contract by arbitration - Application ought to be considered subsequent to the application for a direction on the ground that the panel seized with the first contract application had nearly completed its hearing of that application - Since first contract application granted, Board required to dismiss termination application
- CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE JORGE SILVA; RE L.I.U.N.A., LOCAL 1059 828
- Termination - Petition - Certification application withdrawn when settlement reached that employer would voluntarily recognize the union - Termination application brought under s.60 by one of the petitioners in the certification application - Whether petition initially filed in the certification application can be raised by the applicant as relevant to whether or not the union was entitled to represent the employees in the unit at the time of voluntary recognition - Petition not relevant in this application - Application dismissed
- MARKS, EUGENE; RE U.F.C.W., LOCAL 617 872
- Unfair Labour Practice - Duty of Fair Representation - Grievor complaining about manner in

which employer eliminated his job - Union refusing to process grievance to arbitration - Respondent may not rely in its defence on facts asserted in argument but not addressed in evidence nor is the mere belief of a respondent that it has not violated the Act of any assistance - No breach of duty - Complaint dismissed

GATTELLARO, DOMENIC; RE U.A.W., LOCAL 222; RE CADBURY CANADA
MARKETING INC.

0341-87-G International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, Applicant v. Catalyst Technology (Canada) Ltd., Respondent

Adjournment - Construction Industry Grievance - Practice and Procedure - No one appearing at hearing on behalf of respondent and matter proceeding - Board's attention drawn day after hearing to telex received morning of hearing from respondent stating he would like the hearing re-scheduled - Board's practice on adjournments reviewed - Adjournment would not have been granted on the basis of the telex message anyways - Non-union hire contrary to collective agreement - Compensation awarded

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *A. J. Ahee* and *J. Maloney* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; June 5, 1987

1. This is a referral of a grievance to the Board for final and binding determination under section 124 of the *Labour Relations Act*.

2. The applicant filed this section 124 referral on May 4, 1987. On May 7, 1987, the Board's Registrar forwarded to the respondent by priority post a copy of the referral (Form 104), blank reply forms (Form 107), and a Notice to Respondent of Referral of a Grievance to Arbitration under Section 124 and of Hearing (Form 105), along with the following letter:

I am enclosing herewith a Notice to Respondent of Referral of a Grievance to Arbitration under Section 124 and of Hearing (Form 105) with a copy of the application, attached.

Also enclosed are reply forms (Form 107). Your reply, if any, should be filed in the offices of the Board, 4th Floor, 400 University Avenue, Toronto, Ontario at any time prior to the hearing.

Mr. N. Harper, an Officer of the Board, has been appointed by the Board to confer with the parties to endeavour to effect a settlement of the grievance in this case.

It should be noted that any person or representative who appears at the hearing will be required to testify or produce a witness or witnesses who will be able to testify from his or their personal knowledge as to the facts related to the issues that may arise in connection with the application.

Your attention is directed to paragraph 6 of the Notice of Referral of Grievance (Form 105).

3. The Form 105 Notice included the following information:

1. **TAKE NOTICE** that the applicant, on the 4th day of May 1987, referred a grievance to the Ontario Labour Relations Board for a final and binding determination. A copy of the referral is attached.

2. You shall send your reply to this referral accompanied by the collective agreement to the Board so that,

(a) it is received by the Board;

- (b) at its office, 400 University Avenue, Toronto, Ontario, M7A 1V4 at any time prior to the hearing.

3. If you fail to send your reply to the Board, as set out in paragraph 2, the Board may dispose of the application on the evidence and representations placed before it by the applicant.

4. **AND FURTHER TAKE NOTICE** that the hearing of the referral by the Board will take place at the Board Room, 400 University Avenue, Toronto, Ontario, on Wednesday, the 20th day of May, 1987, at 9:30 o'clock in the forenoon (EDT).

5. **THE PURPOSE OF THE HEARING** is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the referral mentioned in paragraph 1.

6. **IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.**

The respondent did not file a reply to the referral.

4. Since no one appeared on behalf of the respondent at 9:30 a.m. on May 20, 1987, the matter was recessed until 10:00 a.m. as a matter of courtesy in view of the possibility that the representative(s) of the respondent might have been delayed. However, since no one had appeared on behalf of the respondent by 10:00 a.m. that day, the matter proceeded in the absence of the respondent.

5. The hearing of this matter concluded at 12:15 p.m. on May 20, 1987, at which time we reserved our decision and indicated that the Board would issue a written decision as soon as possible. On the following day, the Board's attention was drawn to the following telex message:

MAY 19/87 4:45 P M

TO NORM HARPER

FROM JAMES R. MOSES

CATALYST TECHNOLOGY (CANADA) LTD.

RE: FILE NUMBER 0341-87-G AND 0340-87-U

AS DISCUSSED WITH MR. [sic] SKINNER WE WOULD LIKE TO RE-SCHEDULE THE ABOVE NOTED HEARING TO A DAY IN THE WEEK OF JUNE 1, 1987 THAT IS CONVENIENT TO ALL PARTIES.

PLEASE ADVISE ONCE A DAY HAS BEEN SELECTED.

YOURS TRULY

CATALYST TECHNOLOGY (CANADA) LTD.

JAMES R. MOSES

VICE PRESIDENT AND GENERAL MANAGER

That message was received by the Board's telex operator on May 20, 1987 at 8:40 a.m. and was subsequently placed on the desk of Norman Harper, a Labour Relations Officer who had been appointed by the Board, pursuant to section 124(2) of the Act, to endeavour to effect a settlement of the grievance. At approximately 4:50 p.m. on May 19, 1987, Mr. Moses attempted to telephone

Mr. Harper at the Board's office but was unable to reach him as he had left for the day. Mr. Moses spoke with Ms. Donna Skinner, the Board clerk who answered the telephone when he called, and left a message for Mr. Harper that he was unable to attend the hearing on May 20 and that he would like to reschedule it for the week of June 1. That telephone message was also placed on Mr. Harper's desk. However, neither it nor the aforementioned telex message came to Mr. Harper's attention until May 21, 1987, as he was out of the office all day on May 20 on another assignment. Upon becoming aware of those messages, Mr. Harper drew them to the Board's attention.

6. The usual practice of the Board is to grant an adjournment only on the consent of all of the parties to a proceeding, or where a request for an adjournment is based on circumstances which are beyond the control of the party making the request and where to proceed would seriously prejudice such party. See, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, in which the Board wrote, in part, as follows (at paragraph 7):

.... The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the *Statutory Powers Procedures Act*, R.S.O. 1980, c. 484). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. 1036, at paragraph 8, the Board stated:

".... The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

5. The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, ¶70 CLLC 14,024) wherein the Board stated: '... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness...'

The powers of the Board with respect to adjournments were confirmed by the Ontario Divisional Court in *Re Flamoro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

"Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill*

Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142 (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act* 1971 (Ont.) c. 47, and afford the parties the opportunity to be present and be represented if they wish by counsel. But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

• • •

It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex p. Kynock, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process...."

7. The need for expedition in the context of referrals of construction industry grievances to the Board pursuant to section 124 of the Act is given express legislative recognition by section 124(2), which requires the Board to "appoint a date for and hold a hearing within 14 days after receipt of the referral". In commenting on the implications of that provision in the context of a unilateral request for an adjournment, the Board wrote, in part, as follows in *Osgood Floor Coverings Limited*, [1983] OLRB Rep. June 936:

6. Because of the fluctuating nature of employment in the construction industry, the time required for "normal" arbitration procedures often results in those procedures being unsuitable. In the result, prior to the enactment of what is now section 124 of the Act it was not unusual for parties to engage in "self-help" remedies in response to alleged violations of collective agreements. Through the enactment of section 124 the Legislature sought to remedy this situation by providing for the arbitration of construction industry grievances by this Board and by requiring that grievances be listed for hearing within fourteen days of being referred to the Board. These considerations strongly weigh against any departure from the Board's general adjournment practice when dealing with section 124 grievance referrals.

8. As noted above, Mr. Moses' aforementioned brief telephone and telex messages to Mr. Harper were not drawn to the Board's attention until after the hearing of this matter had been completed. However, if they had come to our attention at or before 10:00 a.m. on May 20, 1987, they would not have prompted us to adjourn the hearing as they provide no indication - much less proof of the type which the Board would require in the absence of agreement by the applicant - that the respondent was unable, due to circumstances beyond its control, to have Mr. Moses or another representative in attendance at the hearing. Thus, in view of the desirability of an expeditious adjudication of this referral, the nature of the grievance, and the background of the case (which includes substantial efforts on the part of the applicant to persuade its members to refrain from embarking upon an illegal strike while awaiting an adjudication of the grievance), an adjournment of the matter would not have been granted on the basis of Mr. Moses' aforementioned telephone and telex messages, and is not now appropriate on that basis.

9. The grievance was delivered to the respondent by telepost on April 29, 1987. It alleged that the respondent was performing the work of "discharging and loading of catalyst" on the Sunco Project in Sarnia with employees who were not members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (also referred to in this decision as the "Union"), in breach of the applicable collective agreement.

10. The respondent is a member of the Boilermaker Contractors' Association (the "Association") and was, at all material times, bound by a collective agreement dated November 1, 1986 between the Union and the Association. That collective agreement provides, in part, as follows:

ARTICLE 2:00 - RECOGNITION AND CRAFT JURISDICTION

• • • •

2.02

The Employer recognizes the jurisdictional claims of the Union as provided for in the Charter Grant issued by the American Federation of Labour to the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, it being understood that the claims are subject to trade agreements and final decisions of the A.F.L.-C.I.O. as well as the decisions rendered by the Impartial Jurisdictional Disputes Board.

For the purpose of clarification, the jurisdictional claims of the Union are contained in the Addendum attached hereto.

• • • •

ARTICLE 4:00 - UNION SECURITY AND DUES COLLECTION

4.01

The Employer agrees to employ as employees, members of the Union in the performance of all work within the scope of this Agreement and to continue in its employ, only employees who are members in good standing with the Union. Except as otherwise provided, all such employees shall be hired through the Union offices. The Employer shall advise the appropriate Union office, in advance of the start of a job, except in cases of emergency work where the Employer is unable to contact the Union office in which case he may commence work and notify the Union office as soon as possible.

4.02

The Union agrees to furnish competent available workmen to the Employer on request, provided however, that the Employer shall have the right to determine the competency and qualifications of its employees and to discharge any employee for any just and sufficient cause. The Employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.

4.03

After the Employer has requested the Union office to furnish workmen to perform work within the scope of this Agreement, and the required number of workmen are not furnished:

- (i) within two working days in cities in which the Local Lodge maintains its Head Office, from that area;
- (ii) within three working days in other areas;

after the date for which the workmen are requested, the Employer shall have the right to procure and retain until layoff the required number of workmen from other available sources, provided that the Employer shall notify the union office when exercising this right.

Such workmen obtained from other available sources shall be required by the Employer to apply to join the Union not later than fifteen (15) days after hiring. The Union shall admit such applicants to membership providing they are qualified, and except for just and sufficient cause.

• • • •

[ADDENDUM]

CLARIFICATION OF

CRAFT JURISDICTION

ARTICLE 2:00-Section 2:02

The Boilermakers' jurisdiction shall include installations such as, but not limited to, all types of ... Oil Refineries....

The Boilermakers' jurisdiction shall include but not be limited to ... [t]he following work in and around refineries, heavy water plants and chemical plants viz: ... catalysts hoppers, reaction boilers....

11. The factual findings contained in this decision are based upon the candid and credible testimony of Joe Maloney, who is the President and Assistant Business Representative of the applicant, and upon the documentary evidence filed with the Board in respect of this matter. The respondent commenced performing the work of discharging and loading of catalyst on the Suncor Project on April 24, 1987, and continued to perform that work until May 8, 1987, using employees who were not members of the Union and who were not hired through the Union offices. Some of those employees were brought in by the respondent from Alberta and from Texas. Others were "hired off the street" in Sarnia through a local hiring agency. The respondent's use of those employees was a cause of great concern among the Union members who were employed on the project by another company. However, Mr. Maloney persuaded the employees to refrain from engaging in an unlawful strike over the matter, and to allow it to be dealt with by legal means.
12. James R. Moses, who was the respondent's managerial representative at the site, told Mr. Maloney that the respondent would be using about eight employees per shift to perform the work in question. In a grievance dated April 27, 1987, the applicant offered to "settle for [the respondent] having four (4) Boilermakers each shift for duration of the job to assist on project". However, that offer was rejected by the respondent. Although the applicant, through Mr. Maloney, repeatedly advised the respondent, through Mr. Moses, that the applicant had qualified members available to perform the work in question, the respondent persisted in using employees who were not members of the Union to perform the work in question, in contravention of Article 4:01 of the collective agreement. In doing so, the respondent used twelve employees on twelve-hour day shifts for a total of twelve days, and also used twelve employees on twelve-hour night shifts for a total of twelve nights. It is clear from the evidence that the applicant had qualified members available to perform the work in question and that, but for the respondent's contravention of the collective agreement, they would have been employed to perform that work.
13. Having regard to all of the evidence and the submissions of counsel for the applicant, we are satisfied that the appropriate remedy in the instant case is an award of compensation framed in accordance with the principles referred to in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused on November 17, 1975. (See also *Arlington Crane Service Limited*, [1985] OLRB Rep. Nov. 1547, at paragraph 17, and the cases cited therein.) Those principles recognize that an employer's breach of a union security clause of the type contained in Article 4 of the aforementioned collective agreement deprives Union members of wages and benefits which would have been paid to them (or to the Union on their behalf) if the employer had complied with his obligation to hire members of the Union through the Union offices. Accordingly, the appropriate way to (insofar as is possible) place the injured parties in the position they would have been in if the collective agreement had not been

violated is to direct the respondent to pay to the applicant in trust (for distribution to its members who were wrongfully denied an opportunity to work for the respondent, and to the applicable plans) the wages, vacation pay, statutory holiday pay, health and welfare fund contributions, pension fund contributions, educational training fund contributions, apprenticeship fund contributions, and administration of collective agreement contributions, which should have been paid by the respondent in respect of the aforementioned work which the respondent performed by using employees who were not members of the Union and who were not hired through the Union offices, in contravention of the collective agreement.

14. Having regard to the provisions of the collective agreement, we find that the total amount of compensation to be paid by the respondent to the applicant (in trust) in the instant case is \$124,176.96. That total is based about the journeyman base hourly rate of \$19.40 (set forth in Appendix "D" to the collective agreement), plus hourly benefits of \$4.96 (as specified in Appendix "D"). It also takes into account the fact that under the applicable provisions of the collective agreement, overtime is payable "at double time rates" for all hours worked in excess of seven and one half hours on week days, and that shift premium is payable in respect of the night shift.

15. For the foregoing reasons, the Board, pursuant to section 124 of the *Labour Relations Act*, hereby makes the following determination:

- (1) the respondent is, and was at all material times, bound by the collective agreement dated November 1, 1986 between the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and the Boilermaker Contractors' Association;
 - (2) the respondent violated Article 4:01 of that collective agreement by employing persons who were not members of the Union, and who were not hired through the Union offices, to perform the work of discharging and loading of catalyst on the Suncor Project in Sarnia during the period from April 24 to May 8, 1987; and
 - (3) the respondent shall forthwith pay to the applicant in trust (for distribution to its members who, as a result of the respondent's violation of Article 4:01 of the collective agreement, were wrongfully denied an opportunity to perform the aforementioned work for the respondent, and to the pertinent funds, including the Union's National Health and Welfare Fund, National Pension Fund, Educational Training Fund, and Apprenticeship Fund) the sum of \$124,176.96.
-

0347-86-R Richard Grandy, Applicant v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, Respondent v. City Plumbing (Kitchener) Limited, Intervener

Construction Industry - Representation Vote - Termination - Respondent alleging applicant not entitled to vote because he was not at work in the voting constituency prior to the vote being taken - Voter eligibility rules reviewed - Individual must be "at work in" the voting constituency both on date vote is ordered and date vote is held in construction industry termination vote - "At work in" requiring physical presence at work - Employee need not be at work in the voting constituency between the two material dates to be eligible to vote - Bargaining rights terminated

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *I. M. Stamp* and *J. Redshaw*.

APPEARANCES: *Ian S. Campbell* and *Richard Grandy* for the applicant; *Stanley Simpson* and *Tom Crystal* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; June 26, 1987

1. This is an application, under subsection 57(2) of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees of the intervener in the bargaining unit for which it is the bargaining agent. By majority decision dated September 2, 1986 [reported at [1986] OLRB Rep. Sept. 1206], a differently constituted panel of the Board directed, pursuant to subsection 57(3), that a representation vote be taken of persons in the following voting constituency:

all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders in the employ of the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

By majority decision dated February 9, 1987, that same panel denied the respondent's request for reconsideration and affirmed its decision of September 2, 1986.

2. Subsequently, a voters list and the voting arrangements were agreed to, the latter at a meeting convened by a Labour Relations Officer on March 11, 1987. The representation vote itself was held on March 30, 1987. The sole ballot cast was by the applicant, Mr. Grandy, who, not surprisingly, marked his ballot against the respondent. By registered letter dated April 3, 1987, the respondent, through its counsel, wrote to the Board as follows:

Further to the vote held on March 30th, 1987, we wish to make representations with respect to the representation vote as follows:-

The business agent for the union, Local 527, Tom Crystal arrived at the vote site at approximately 10:08 a.m. At that time, the sole ballot had been entered in the ballot box. The vote was then concluded in the presence of Mr. Crystal at 10:15 a.m. At that time, Mr. Crystal asked that any ballots be segregated on the basis that persons who voted were not entitled to vote since they were not employed in the I.C.I., Sector of the Construction Industry *prior to the vote being taken*. Crystal did not sign the report because of the refusal to segregate the ballot cast and because he was not there when the ballot was cast.

It will be our submission that the last return in the I.C.I. Sector which was received from City Plumbing (Kitchener) Limited was for August, 1986. No welfare remittance forms had been received for November, December, 1986 and for January, February and/or March, 1987. Accordingly, no one was employed by City Plumbing (Kitchener) Limited in the I.C.I. Sector *prior to the vote being taken*. It will be our submission that the applicant should not be able to bring about a termination of bargaining rights on a provincial basis which would cover all potential employees, *if no one was employed* by the employer, City Plumbing in the I.C.I. Sector for a period of six months prior to the vote being taken.

The hearing is requested by the respondent union to consider these representations. It is requested that before a hearing date be fixed that both the applicant, respondent and intervener be consulted so that the date is mutually satisfactory for all.

All of which is respectfully submitted on behalf of the respondent.

[emphasis added]

3. Pursuant to the respondent's request, a hearing with respect to the matter was held in Toronto on May 11, 1987. At that hearing, counsel for the respondent argued that Mr. Grandy was not entitled to vote because it had not been established that he had been at work for the intervener in the industrial, commercial and institutional ("ICI") sector of the construction industry during the times material to voting eligibility and because he was not representative of the intervener's ICI work force. Counsel also argued that it had not been established that there were no other employees of the respondent who were not eligible to vote and that this also vitiated the vote. Counsel asserted that he could adduce evidence that would consist of details of the contacts between the respondent and the intervener which would establish that the respondent had received none of the remittances or information required by the collective agreement with respect to persons employed by the intervener in the ICI sector of the construction industry since August 1986 and that this would, by inference, establish that there were no such employees and that, accordingly, there was no one in the voting constituency during the material times. He suggested that the material times include not only September 2, 1986 and March 30, 1987, but the period of time between those dates as well. Indeed, counsel emphasized the importance of that intervening period. Counsel did not suggest that the respondent had any affirmative evidence, either of its own or that had been subpoenaed, which supported his assertions. He submitted, however, that the lack of evidence either that the applicant was entitled to vote, or that there were no other employees entitled to vote should be sufficient to cause the Board to either dismiss this application outright, or direct that a new vote be taken at such time as there is a "representative" work force employed by the intervener in the ICI sector of the construction industry.

4. After adjourning to consider the representations of the parties, the Board rejected the arguments of the respondent and ruled orally, with reasons to follow, that neither the vote, nor the results thereof, should, in the circumstances, be interfered with. The Board further ruled that, in the result, the standard Board decision reflecting the result of the vote would issue.

5. The Board's practices with respect to voter eligibility in the representation votes that it directs be taken are well-established. It has developed a two-pronged voter eligibility rule based on two material dates; the date of the Board decision ordering the vote (or, on the terminal date fixed for a certification proceeding in which a pre-hearing vote has been requested) and the date the vote is taken. The object of the Board's practices is to provide certainty and finality in proceedings where representation votes are taken, and to reduce the likelihood of attempts to gerrymander the voters list in an effort to influence the outcome of a vote (see *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. April 461 and *Crowle Electrical Limited*, [1982] OLRB Rep. Oct. 1458).

6. The Board has also long recognized that there is a difference between employment in the construction industry and non-construction employment. A major difference between the two is that employment in the construction industry tends to be intermittent and transitory relative to non-construction employment. A great deal of construction work is seasonal or subject interruption due to inclement weather. When they do work, construction employees tend to work in small crews and continuous employment with any given employer is often measured in weeks or months rather than years. In recognition of the differences between them, the Board has established a practice of approaching the two situations differently. For example, in both applications for certification and termination proceedings, the employer involved is required to file with the Board a list of employees in the bargaining unit so that the Board can, as it must, ascertain the level of employee support of the application before it. In proceedings relating to the construction industry, the Board counts only these persons actually at work in the bargaining unit on the date of application in determining the number of employees in the bargaining unit. In contrast, in non-construction proceedings, the Board does not require an individual to be at work in the bargaining unit on the date of application for purposes of the count so long as s/he was an employee in the unit on that day, and did actually work in it on at least one day in the thirty day period prior to and one day in the thirty day period subsequent to the date of application. Similarly, when a representation vote is held in the course of proceedings involving the construction industry, a person is entitled to vote if s/he was *at work* in the voting constituency on the date of the Board's decision directing the vote (or, where a pre-hearing vote is requested in a certification application, on the terminal date), and the day of the vote. In non-construction matters, on the other hand, an individual is entitled to vote if s/he was *employed* in the voting constituency on those two material dates. Being "at work in" the voting constituency requires an individual to be physically on the job. Being "employed in" the voting constituency does not require a person's physical presence at work so long as s/he has not been permanently removed from employment in the voting constituency. This distinction illustrates the Board's practice of focusing on specific dates in construction industry proceedings and on periods of time in non-construction matters, and it reflects the Board's attempt to accommodate the differences between the two employment situations.

7. Contrary to what counsel for the respondent suggests, so long as employment in the voting constituency is not terminated, in neither case does the Board require an individual to be at work in it for any minimum period of time, or at all, during the period between the two material dates in order to be eligible to vote. It would be impractical and unrealistic to impose any such requirement. It is to be expected that some employees will not be at work, or if at work not be performing work within the voting constituency, during some part, or all, of the period between the date of the Board decision directing the vote (or the terminal date in the case of a pre-hearing vote), and the day the vote is taken. That is particularly true in the construction industry where the vagaries of employment are such that it is possible, even likely, that imposing a requirement that an individual perform work in the voting constituency during that intervening period would, in many cases, result in there being no one entitled to cast a ballot. The *Labour Relations Act* provides employees with an opportunity to join and be represented by a trade union in their employment relations with their employer, and also permits them to terminate that trade union's right to represent them, if they see fit to do so. It would be inappropriate for the Board to adopt procedures which would effectively deny either right. Furthermore, such a requirement could create uncertainty and invite protracted litigation, neither of which is desirable in labour relations matters, particularly those relating to representation rights.

8. The purpose of the Board's practices is to ensure that the persons affected by the outcome of a vote; that is, the employees in the bargaining unit affected, have an opportunity to participate in a representation vote where one is directed. To achieve that goal, the Board has formulated different approaches to employment in the construction industry and non-construction

industry employment in response to the differences between the two employment situations. Some of those differences in approach have already been discussed. They are also reflected in the difference in the meaning that the Board has ascribed to the standard language it has long used to describe voter eligibility in representation votes in the construction industry compared to that in non-construction votes. In the result, in non-construction matters, a person need not be "at work in" the voting constituency at any time so long as s/he is "employed in" it. In construction matters, the same eligibility terminology has been made equivalent to "at work in" so that a person must be at work in the voting constituency on both of the material dates; that is, the date of the Board decision ordering the vote (or the terminal date in the case of a pre-hearing vote), and the day the vote is taken in order to be eligible to vote (see *Crowle Electrical Limited, supra*). This reflects the Board's attempt to strike a balance between the vagaries of employment in the construction industry and the object of affording affected employees an opportunity to vote.

9. Accordingly, the effect of the Board's decision dated September 2, 1986 in this proceeding is that an individual was entitled to cast a ballot by the Board if s/he was at work for the intervener as a plumber, plumbers' apprentice, steamfitting steamfitters' apprentice, or welder in the ICI sector of the construction industry on both September 2, 1986 and March 30, 1987.

10. In this case, the respondent did not deny that Mr. Grandy was at work in the voting constituency on either September 2, 1986 or March 30, 1987. The respondent alleges only that Mr. Grandy was not at work in the voting constituency *prior to* the vote being taken. It is noteworthy that at no time prior to the taking of the representation vote did the respondent make any challenge to the voters list or to Mr. Grandy's right to cast a ballot. Indeed, Mr. Crystal, business agent for the respondent, specifically agreed to a voters list upon which only Mr. Grandy's name appeared. It was not until after the vote had been taken, when Mr. Crystal knew that only Mr. Grandy had cast a ballot and therefore knew what the result would be, that there any objection made on behalf of the respondent.

11. The respondent did not suggest that the information that it had for the period subsequent to the preparation of the voters list and the voting arrangements being made, and to which it specifically agreed, was different from the information it had for the preceding period. Indeed, the respondent did not suggest that it had *any* information or evidence to suggest either that the applicant was not eligible to vote or that any other person both was eligible to and did not have the opportunity to vote. It merely stated that it had no information to confirm either that Mr. Grandy was eligible to vote or that there was no one else who was eligible but was not given the opportunity to do so. In our view, the onus is on the party challenging or objecting to the voting process to satisfy the Board that there is substance to its challenge or objection. In the absence of any indication by the respondent that it wished to adduce any affirmative evidence in support of its assertions, and having regard to the circumstances, including the timing and circumstances under which its objections were made, we were satisfied that, even if the respondent established that it had not received the appropriate remittances from the intervener, there was no cogent reason for doubting Mr. Grandy's eligibility to vote.

12. Neither did we find any merit to the respondent's submission that the vote was invalid because Mr. Grandy was not representative of the intervener's ICI work force. Mr. Grandy *is* the intervener's ICI work force for the purposes of this proceeding. It appears that Mr. Grandy has been the only employee in the bargaining unit to which this application relates for some time and there was no suggestion that that situation is likely to change in the future. We were unable to appreciate how Mr. Grandy could not be representative of himself. Further, to accept the respondent's submission that there must be a "more representative" work force would effectively and unjustifiably deny Mr. Grandy his rights under the *Labour Relations Act*. In rejecting an analogous

argument that there must be more than one employee in the bargaining unit on the date an application for a declaration terminating bargaining rights is made, the Board held, at paragraph 7 of its September 2, 1986 decision in this matter [reported at [1986] OLRB Rep. Sept. 1206], that:

7. The decision in *Stuart Riel Masonry Contractor* does not advance the argument of the respondent. It does not address the issue raised by the respondent. However, that decision does state at page 1634:

In the construction industry, because of the short term nature of the employment relationship, it has been the consistent policy of the Board over many years to count as employees only those employees at work on the application date. This applies equally to the applications for certification and for termination of bargaining rights.

The Board has entertained applications to terminate bargaining rights where there has been only one employee in the bargaining unit on the date of the application. For example, in *A. R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911, the Board was faced with this situation and after reviewing the provisions of section 57(2) stated at page 912:

2. In the instant case, there is only one employee in the bargaining unit, and for this reason the respondent union argues that no termination application can be brought. The union points out that on a certification application, the Act prevents the Board from determining an appropriate bargaining unit unless such unit consists of more than one employee; moreover, the term "bargaining unit" is defined in section 1(1)(b) to mean a "unit of *employees* (plural) appropriate for collective bargaining". The union argues, by analogy, that if two employees were required for a bargaining unit to be certified, bargaining rights cannot be extinguished unless there are at least two employees in the unit. The union also questions whether there is a bargaining unit at all in this case, when the definition of that term appears to require a collectivity.

3. We cannot accept these contentions. In the construction and related industries, the number of employees in a bargaining unit can fluctuate substantially, and from time to time, the bargaining unit may even be vacant. Indeed, section 121 of the Act contemplates that the parties can negotiate a collective agreement even if there are no employees in the bargaining unit at the time the agreement is entered into. It is inconsistent to assert as the union does that there is no "bargaining unit", while at the same time maintaining that it continues to represent the applicant employee; and, we would not lightly embrace an interpretation which could conceivably lock an employee, unwillingly, into a bargaining unit with no possibility of escape, even in the "open period" prescribed in section 57(2)(a). In our view, such submission is entirely inconsistent with the scheme and purpose of the Act. Section 57(2) provides that *any of the employees* in the bargaining unit may make a timely application to terminate bargaining rights, and we are satisfied that the applicant has properly done so here.

The same reasoning is equally applicable in the instant application and the Board finds that it has jurisdiction to entertain the instant application to terminate the bargaining rights of the respondent.

We agree, and we find that rationale equally applicable to the representation vote that arises out of such applications. Accordingly, we rejected the respondent's argument in that respect as well.

13. On the taking of the representation vote directed by the Board, more than fifty percent of the ballots cast were cast in opposition of the respondent. The Board therefore declares that the respondent no longer represents the employees of City Plumbing (Kitchener) Limited for whom it has heretofore been the bargaining agent. Pursuant to subsection 57(6) of the *Labour Relations Act* any collective agreement in operation between the respondent and City Plumbing (Kitchener) Limited that is binding on the employees in the bargaining unit now ceases to operate.

14. The Registrar is directed to destroy the ballot cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a request that it not be destroyed is received by the Board from one of the parties before that thirty day period expires.

1359-86-R United Food & Commercial Workers International Union, Applicant v. Cobi Foods Inc., Respondent

Build-up - Certification - Representation Vote - Terminal date extended following change in bargaining unit description - Application made during pea-picking season - Work force expected to expand during corn season - Whether representation vote should be ordered - Employees on the application date "representative" of the employer's employment environment - Vote unnecessary - Certificate issuing

BEFORE: *V. Solomatenko*, Vice-Chair, and Board Members *R. J. Gallivan* and *B. L. Armstrong*.

APPEARANCES: *Martin Levinson*, *Bruce Zufelt* and *Sharon White* for the applicant; *Gordon J. Weir* and *John King* for the respondent.

DECISION OF V. SOLOMATENKO, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; June 16, 1987

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Whitby, Ontario, save and except fieldmen, forepersons, persons above the rank of foreperson, office and sales staff, and employees for which any trade union held bargaining rights as of July 31, 1986, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The applicant union filed this application for certification on July 31, 1986 and, in accordance with the Board's Rules of Procedure, August 15, 1986 was set as the terminal date. Subsequent to the processing of the application and the setting of the terminal date, the applicant requested an amendment to the bargaining unit description. By decision dated August 29, 1986, a differently constituted panel of the Board amended the bargaining unit description as requested and directed that the Registrar reprocess this application and extend the terminal date in accordance with the Board's Rules of Procedures. As a result, the terminal date in this application was extended to September 15, 1986.
5. The respondent has filed the appropriate employer's lists indicating that it had a total of 34 employees in the bargaining unit as of the application date, July 31, 1986. On or before August 15, 1986, the applicant filed 33 membership cards in support of its application and, on or before September 15, 1986, it filed a further 29 membership cards, for a total of 62 cards. Twenty-three of the applicant's membership cards filed on or before August 15, 1986 coincide with the names on

the employer's lists of 34 employees in the bargaining unit as of July 31, 1986. On that basis, the Board is satisfied on the evidence that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 15, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. Upon an application for certification, section 7(1) of the Act requires the Board to ascertain the number of employees in the bargaining unit at the time the application was made. By reason of Rule 75(1) of the Board's Rules of Procedure, the instant application is deemed to have been made or filed on July 31, 1986, being the date the application was mailed by registered mail. The respondent submits, however, that July 31, 1986 is not the appropriate date for determining the number of employees in the bargaining unit. It requests that the Board either amend the application date to a date "within a representative time period" and reprocess the application in accordance with that amended date, or direct the taking of a representation vote. The application date, that is, the time as of which the number of employees in the bargaining unit is to be ascertained, has been fixed immovably by statute and is not subject to variation by the Board: *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 and *R. v. Ontario Labour Relations Board. Ex parte Hannigan et al.*, [1967] 2 O.R. 469. The issue to be determined in this matter therefore is solely whether the Board should exercise its discretion to order a representation vote.

7. The respondent's arguments in this matter arise out of the seasonal nature of the work performed by the employees of the bargaining unit subject of this application for its canning operations. The respondent is a food processor and the applicant already holds bargaining rights with respect to the regular or permanent employees. The unit subject of the instant application is in essence a tag end unit of employees who work for varying periods of time during the respondent's picking and packing season which extends from approximately June to October of each year. The Board does not normally distinguish between temporary or seasonal employees and permanent employees in determining what constitutes an appropriate bargaining unit. However, an exception to that rule has been established in the canning and tobacco-harvesting industries. In *Melnor Manufacturing Ltd.*, [1969] OLRB Rep. Mar. 1288, the Board noted that its practice in these industries has been to include the seasonal or temporary employees in the unit if the application was made during the season, but not to include them if the application was made in the off-season. The instant application, however, is made with respect to a unit comprised exclusively of temporary or seasonal employees; there is no core group of permanent employees.

8. Neither party called evidence in this matter. Since the applicant took no exception to the respondent's submissions regarding the number of employees and the timing of the various hirings throughout the season, we accept them in the nature of an agreed statement of facts for purposes of our determinations herein. The first employees are hired sometime in June or July and additional employees are hired at various times determined generally by the harvesting requirements of the different crops. The respondent states that the application date coincided with the end of its pea season during which time it traditionally requires 25 to 30 employees. As of August 10th, the respondent had hired 53 new employees, 27 of whom were hired on August 10th itself. This group was hired with respect to the corn season which begins about mid-August and peaks about mid-September. As of August 30th, the respondent had 99 employees and it contends that it has traditionally required approximately 100 employees at this same time each year. The respondent states that, in the period between July 1st and September 15th, 1986, it had hired 157 persons in order to be able to maintain a complement of 100 employees at any particular time.

9. Counsel submits that, although the respondent's position in this matter is somewhat

unique, it is entirely consistent with the unusual employment pattern of these employees. He states that the respondent's traditional timing for hiring the different groups of employees throughout the season is known to the applicant. In his view, it is entirely open for the applicant to gerrymander the bargaining unit as it pleases in these circumstances. Basically, the respondent's position is that the Board should not consider the 34 employees on the list on the date of the application as being representative of a bargaining unit of seasonal employees which traditionally increases three-fold a short time thereafter.

10. Counsel for the respondent suggests that a concern with the fluctuation of the work force during the season is implicit in the Board's existing jurisprudence dealing with seasonal employees in canning and tobacco-harvesting. He notes that in *Melnor Manufacturing* the Board stated specifically that the application for certification, which included seasonal employees, was made during the height of the season. In this respect, counsel also relies upon the Board's statements in *Filkon Food Services Limited*, [1981] OLRB Rep. Dec. 1771 at paragraph 4:

4. The alteration of physical premises, however, has never been a factor in the Board's application of its "build-up" principle. Rather, the Board's sole concern is whether the employee complement at the time of an application for certification is "representative" of the full complement on an ongoing basis (see, e.g. *Atlantic Packaging*, [1980] OLRB Rep. Feb. 158, paragraphs 8 and 9). *What the respondent is relying upon in this case is a purely seasonal fluctuation in its work force*, involving the increased use of students in the summer. The Board has never held that an application for certification which includes summer students must be brought in the summer. *More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either "build-up" or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting* (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*...). The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on a "seasonal" basis.

[emphasis added]

11. The respondent's next argument is based on the Board's decision in *Queen's University at Kingston*, [1982] OLRB Rep. May 753, which dealt with an application for certification in which the applicant had requested a pre-hearing representation vote. That application was with respect to a bargaining unit of graduate students engaged in teaching and tutoring. The issue the Board had to contend with in that instance was the timing of the vote, having regard to the fact that there was a large influx of graduate students into the bargaining unit in the period between October and April. The application for certification had been filed in May. Counsel refers to paragraph 11 of the decision in *Queen's University* where the Board stated:

11. As in the *Filkon* and *Peter Austin* cases, the employment level at the time of the present application (603 employees) constituted a substantial and representative number of the persons in the employ of the respondent (during the period from September to late April). Therefore, if the applicant were able to satisfy the Board that more than fifty-five per cent of those employees were members of the applicant on May 10, 1982 (the terminal date, and the membership date determined by the Board under section 103(2)(j)), the Board could certify the applicant without a representation vote. However, the applicant does not purport to be in a position to do so. Thus, if it is to obtain bargaining rights, it must win a representation vote. It is this aspect of the case which has presented the Board with some difficulty. Unlike the *Filkon* and *Peter Austin* cases, the persons employed in the proposed unit on the terminal date (and the persons who would be employed at the time at which a pre-hearing vote would be taken in the normal course of events) are not persons employed in the unit on a year round basis, nor can they be said to be substantially representative of the persons who are generally employed in the unit during the period from September to late April. Quite to the contrary, they are only a small fraction of such persons, and a highly disproportionate number of those who make up that fraction are graduate students in Psychology or Economics.

The respondent's position is that the same principles the Board applied in *Queen's University* to determine the timing of the pre-hearing vote should now be used to determine the appropriate application date for the instant application for certification. Counsel further notes that the respondent's arguments are based purely on the fact of a "seasonal *hiatus*" or fluctuation in the number of employees and not on projections of future employment levels as is the case for purposes of the "build-up" principle.

12. Counsel for the applicant argues that the respondent is essentially asking the Board to restrict the time for making the application to the corn season, which is the period during which the respondent employs the greatest number of employees. In his view, that would constitute a variation of the build-up principle which is really applicable only in the context of new enterprises. In this respect, counsel further submits that *Filkon Food* does not stand for the proposition that the build-up principle is applied in the canning industry. Instead, it simply states that to include seasonal employees an application for certification in the canning and tobacco-harvesting industries must be made during the season.

13. The applicant contends that to grant the respondent's request in this instance would in effect frustrate or thwart the presumption under the Act to grant employees a right to bargain collectively. Counsel notes that, although the respondent is requesting a vote, there would be no employees there for the vote after mid-October. The parties would therefore have to wait until next year in order even to have a vote. As to the issue of representative numbers of employees raised in the *Queen's University* case, counsel for the applicant argues that case is distinguishable on the basis that it represents the Board's exercise of discretion in the context of a request for a pre-hearing vote.

14. We concur with counsel for the applicant that *Filkon Food* simply states that the Board's practice with respect to applications for certification in the canning and tobacco-harvesting industries is to include seasonal employees in the bargaining unit if the application is made during the season and not include them if made in the off-season. Neither *Filkon Food* nor *Melnor Manufacturing* can be interpreted as even an implied endorsement by the Board, as suggested by the respondent, of some principle that it will consider the amount of "build-up" during the season before it will include the seasonal employees in the bargaining unit.

15. The statements upon which the respondent relies in both *Filkon Food* and *Melnor Manufacturing* must be considered in the context of the decisions in which they arise. To begin with, neither of these cases, nor *Universal Cooler*, [1967] OLRB Rep. Sept. 546 which was referred to in *Filkon Food*, was involved with either the canning industry or tobacco-harvesting. Consequently, none of these cases was a direct application of the Board's exceptional practice with respect to seasonal employees in the canning or tobacco-harvesting industries. In each case, the respondent employer sought to exclude its seasonal or temporary employees from the bargaining unit for which an application for certification had been filed. In each case, however, the Board denied the request. As was noted in *Filkon Food*, the Board has consistently refused to take into account seasonal fluctuations in a work force or to distinguish between permanent or regular employees on the one hand and temporary or seasonal employees on the other. In so doing, however, in each case the Board noted that the only exception to that rule is with respect to seasonal employees in the canning and tobacco-harvesting industries. But, in none of these cases did the Board further state, either directly or indirectly, that it also takes into account how many of the usual number of seasonal employees are in the unit at the time of the application.

16. As previously noted, counsel for the respondent has indicated that he is not relying upon the Board's traditional build-up principle to support the request for a representation vote.

Nevertheless, there is some element of "build-up" implicit in the respondent's arguments which rely upon a similar rationale of "representation" as articulated by the Board with respect to its classical build-up principle. In this respect, we note the Board's comments in *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. Feb. 158:

8. The Board will defer certification of a trade union where there is a planned build-up of the work force such that a representative segment of the planned work force is not employed as of the date of the application. The rationale in support of deferral is based upon an acknowledgement of the right of those employees who will be hired as part of the planned build-up to take part in the selection of a bargaining agent. *Certain conditions must be met, however, before the Board will impinge upon the right of the present employees to engage in collective bargaining.* These are: (1) the present employees do not constitute a representative segment of the work force to be employed; generally the Board considers fifty per cent of the projected work force in a representative number of the classifications required to operate the plant as constituting a representative segment of employees for the purpose of certification; (2) the "build-up" is planned to take place within a reasonable period and (3) the "build-up" does not depend upon factors which are beyond the control of the employer, such as market conditions.

[emphasis added]

9. ...If the conditions precedent to a planned "build-up" exist, the Board will exercise its discretion to conduct a representation vote as of the time that a representative number of employees are within the bargaining unit so as to satisfy itself that a majority of those in the unit desire to be represented by the applicant trade union. The practice of the Board is consistent with the scheme of employee choice and majority representation as established under the Act and flows from a legitimate exercise of the discretion given the Board to hold representation votes.

The Board emphasized the principle of majority support in *Atlantic Packaging* with the further statement that:

10. ...The requirement of majority support is so fundamental to the operation of the Act and the build-up principle so clearly enunciated in the Board's jurisprudence that the parties to an application for certification where a planned build-up of the work force is imminent cannot be heard to say that they are under no obligation to inform the Board of this fact.

17. It is essentially this "fundamental" principle of majority support that was the basis of the Board's direction in *Queen's University* to defer the pre-hearing representation vote until such time that:

...a representative number of employees will be in the bargaining unit so that the Board can properly satisfy itself, within the scheme of free employee choice and majority representation established under the Act, as to whether or not a majority of those in the unit desire to be represented by the applicant trade union in their employment relations with the respondent. (at para. 13).

In so doing, the Board stated that it was adopting an approach similar to that adopted in *Island of Bob Lo Company*, [1970] OLRB Rep. May 211. In the *Bob Lo* case, the employer operated an amusement park during the summer months during which time it would employ approximately 13 persons. Prior to the start of its normal season, however, an application for termination was brought at a time when there were only two employees in the bargaining unit. The respondent union argued successfully in that case that the Board should direct the representation vote to be taken at a time when the full complement of employees were at work.

18. In *Bob Lo*, the Board deferred the taking of the representation vote on the following basis:

9. It is clear from the undisputed facts outlined above that the intervener is in the process of

building up the bargaining unit to its usual complement and that such build-up will be substantially completed or [sic] or about June 1st when the park will be in operation. In these circumstances, we are of opinion that the Board should apply its build-up principle and delay the taking of the representation vote in this matter until a representative number of employees are employed in the bargaining unit....

[emphasis added]

In somewhat prophetic terms, the dissenting opinion in *Bob Lo* commented as follows on the Board's application of the build-up principle in that instance:

I dissent with respect to the decision of the majority dated May 15, 1970, in this matter. In my respectful opinion this is not an instance where the Board should apply its "build-up" principles.

It had hitherto been my opinion that the principle of build-up was applicable only in the situation of new enterprises. The majority, however, have indicated that this is not the case and it would now seem from their decision that in any situation where the complement of employees will be substantially increased, the principle of build-up will prevail. This, of course, should apply also to applications for certification.

Thus, in an application for certification, if an employer submits that within a reasonable period his complement of employees will substantially increase, either by the hiring of new full-time employees or by the hiring of seasonal employees, it would follow that the Board should not certify immediately, but should wait until a representative number of employees are employed in the bargaining unit, at which time the Board should conduct a representation vote.

19. To put the matter into its full context, it must also be noted that the application of the build up principle is specifically excluded for purposes of the construction industry by virtue of section 119(2) of the Act which states:

In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.

The Board has on numerous occasions been invited to and has declined to apply the build-up principle in the construction industry. The rationale for declining to do so was expressed in the following terms in *Colibri Construction Inc.*, [1986] OLRB Rep. May 594:

8. Assuming to be true everything the respondent has stated in paragraph 13 of the reply, what has been depicted is the common state of affairs in the construction industry. *Construction business most frequently consists of performing a series of relatively short-lived contracts, a major factor responsible for the short-term employment relationship typical of the industry.* That is why it has been the Board's consistent practice to consider only those persons at work in the bargaining unit on the date of making of the application for purposes of deciding how many employees are in the unit and how many of those employees are members of the applicant within the meaning of the Act. That also is why the Board just as consistently has ignored diminution of or accretion to the bargaining unit, including what is more particularly referred to as build-up, after the date of application.

[emphasis added]

20. Thus, in one fashion or another, the build-up principle is not too far removed from the respondent's argument in the instant application based on representative employees at the time of making the application. The Board's formulation and application of the build-up principle represents a balancing of interests within the legislative scheme of labour relations. It is implicit in the *Atlantic Packaging* case that the exercise of the Board's discretion to order a representation vote on the basis of the build-up principle impinges on the right of the present employees to engage in collective bargaining. The reason or rationale for the Board to so impinge on the right of present

employees is that it is not satisfied that these employees constitute a representative segment of an anticipated work force. Yet, in the context of the construction industry, the Board will not apply the build-up principle regardless whether the present employees are "representative" or not. The rationale for not applying build-up in the construction industry is attributed to the nature of the employment in the industry, specifically the short-term employment relationship typical to the industry.

21. As was evident from the outset, the instant application represents an unusual fact situation which does not fall neatly into any of the usual category of cases to come before the Board. The instant application is not one which is properly within the construction industry. Nevertheless, it is quite evident that the work environment of the employees subject of this application is more akin to the construction industry than the industrial sector which gives rise to the build-up principle.

22. As in the construction industry, the work of this bargaining unit is comprised of a series of projects for which varying numbers of employees are hired at different times of the season. The season starts in June with no employees in the unit. About 30 employees are required in July for the pea season and that represents full employment for the respondent's operations at that time. About 100 employees are required in mid to late August and by mid-October the unit is down to zero employees again. There simply could not be a more typical description of construction industry employment. Even on that basis alone, we would be inclined to determine this application on the basis of the construction industry principle of considering only the employees at the date of the application.

23. The specific question put to the Board in this case is whether the employees at the time of the application were "representative". The respondent has framed the issue only in terms of numbers. That is, it alleges that the 30 or 34 employees on July 31st were not representative of the 100 employees at the peak of the season. However, even for purposes of its traditional build-up principle, the Board is prepared to entertain a vote where only fifty per cent of the projected number of employees are already at work. It is in that context that the Board states it will conduct a vote to determine whether there is the support of a "majority" of representative employees. Also, in determining the timing of the vote, the Board is concerned whether there is fifty per cent in a representative number of the classifications. These criteria are formulated in the context of a fairly stable industrial environment. It is expected that the work force will "build-up" to a certain level and the operation will continue at or about that level with a relatively stable work force. What the Board looks for in those circumstances is a representative segment of that projected work force.

24. However, the working environment subject of the instant application is not of the nature which gave rise to the build-up principle. As noted previously, it approximates more the working environment of the construction industry, consisting of short-term employment relationships. Furthermore, what constitutes a "representative" segment of the employees of the bargaining unit in this application may have little relation to the maximum number of employees that the respondent may employ in the course of the season. On or about the date of the application, the respondent was in full operation. That was the height of the pea picking season and the respondent had the full complement of employees it required for its normal operations at that point. Nothing in the submissions before the Board suggests that the 30 or 34 employees on the date of the application, are any less representative of the type of employees or the interests of the employees in this unit than the 100 or so employees who may be present during the peak of the corn season. There is no suggestion and certainly no evidence that the work required during the corn season is in a different classification than the work required for the pea picking season.

25. Having regard to the evidence before us, it is our view that the employees working at the date of this application were “representative” of the respondent’s employment environment. The accretion to the bargaining unit thereafter for the corn season is more properly characterized as the normal ebb and flow of the work force. As was noted in *Filkon Food* and the other cases previously referred to, the Board does not in most circumstances take into account the normal ebb and flow of the work force. In terms of a balancing of competing interests, in our view, the right of the employees present at the time of this application to engage in collective bargaining must be given preference over the prospective right of future employees to take part in the selection of a bargaining agent, particularly in the circumstances of a work environment where the term of employment of those future employees may be significantly less than that of those present at the time of the application. Having regard to the facts which have been alleged before us, and the Board’s jurisprudence relative to this matter, we do not find any necessity for ordering a representation vote.

26. A certificate will therefore issue to the applicant.

DECISION OF BOARD MEMBER R. J. GALLIVAN;

1. The certification process under the *Labour Relations Act* has several fundamental underpinnings. The most important of these is a requirement that before being given a licence to engage in collective bargaining under the protections of the Act a union must enjoy majority support of the group of employees which it wishes to represent. Just which of an employer’s employees on whose behalf the union may act is determined in the certification process by identifying the cadre of employees who occupy positions within the parameters of a defined subdivision or grouping of employees deemed by the Board to be “appropriate” for collective bargaining purposes, known under the Act as a bargaining unit.

2. In determining “appropriateness” the Board must consider a number of factors beyond a mere determining of the geographic parameters of the bargaining unit, criteria such as community of interest among the employees, exclusion of managerial personnel from the unit, historical trade interests and so on. As well, the Board must determine whether or not the number of persons in the bargaining unit is representative in the face of any evidence that there may be imminent a planned build-up of the workforce such that, if it occurs, those in employment at the certification application date may not be representative within a reasonable time of the eventual workforce. In labour relations terms this criterion has become known as the “build-up principle”. Its validity as an appropriate consideration in certification proceedings has been endorsed by the Supreme Court of Canada (*Noranda Mines Ltd., v. The Queen et al.*, 7 D.L.R. (3d) 1). In supporting the principle, Martland J. said (about the Saskatchewan Board):

That the Board should consider this factor in cases of this kind, in the interests of employees, seems to me to be logical. A union selected by a handful of employees at the commencement of operations might not be the choice of a majority of the expected large work force.... In my view the Board not only can, but should, consider these factors in reaching its decision....

3. In another *Noranda Mines Ltd.* case (but of the British Columbia Labour Relations Board, [1982] 2 CLRB 475), it was noted that central to the scheme of the certification sections of labour legislation is the concept of a unit appropriate for collective bargaining. In making a determination of appropriateness, the Board should look to the representative nature of the complement of employees present at the time of the certification application. A bargaining unit determination which would effectively install a union which was not a freely chosen representative of the employees would not be an appropriate unit within the meaning of the legislation. The Board referred to the reasoning of Berger, J. in *Board of School Trustees of School District No. 57*

(*Prince George*) and International Union of Operating Engineers, Local No. 858 (B.C.S.C.) [1974] 1 W.W.R. 197, at pp. 206-7:

The board determined that the unit here was appropriate for collective bargaining. The board, by considering the application made in August, disenfranchised those employees who would be hired in September. That was a clear departure from the lines or objects of the statute. The choice of a bargaining agent, in a case like this, ought to be the choice of a majority, and I do not think it can be said that there has been a choice made by a majority when the employees who work ten months out of twelve have had no say in that choice. The majority the union had in August was a transitory one. It was not a majority coming within the scheme of the Act. *The board's power to decide whether a bargaining unit is appropriate does not allow it to breach the fundamental principles of the statute itself.*

[emphasis added]

The build-up principle is an established part of the jurisprudence of the National Labour Relations Board in the United States as well.

4. Consideration by the Ontario Board of a possible build-up in the workforce has been a long-standing practice which has survived numerous legislative amendments to the Act, one of which in dealing with the construction industry added section 119(2):

In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 7(2), the Board *need not* have regard to any increase in the number of employees in the bargaining unit after the application was made.

[emphasis added]

I believe the majority errs in law in concluding that the build-up principle is “specifically excluded” from consideration in construction industry certifications by virtue of that section. With respect, all that section says is that in determining bargaining unit appropriateness the build-up principles *need not* be considered in construction cases. It does not say it *must not* be considered, as concluded by the majority. Further, I believe that a clear inference which can be drawn from that section is that elsewhere than in construction the Board must consider an imminent employment build-up since only in construction is it authorized not to do so when exercising its discretion based on the particular circumstances of each case. Even in construction the section leaves it open to apply the principles if the Board considers it appropriate to do so. There is no similar exception elsewhere in the Act for seasonal employees. Thus, outside construction, the Board in my view is obliged to take account of a possible build-up where there is evidence that one is imminent, and to apply that principle to the evidence fairly and in accordance with its practices and precedents. In my view, the Board lacks jurisdiction to read seasonal or cyclical employees out of the Act. Canning and other seasonal employment is not new in Ontario. It has existed as an industry for a great many years; in fact, it pre-dates the *Labour Relations Act*. Thus, if the Legislature had intended to relieve the Board of the requirement to give adequate effect to a build-up in that or other seasonal industries beyond construction, it could have done so on any number of occasions when amending the Act by making an exception similar to that for construction. The Legislature has not done so and therefore this Board has an obligation to apply the build-up principle to all employment other than construction, including all other types of cyclical or seasonal employment. As the Supreme Court has said in interpreting similar legislation elsewhere, the exercise of the Board’s discretion to determine the appropriateness of a bargaining unit “does not allow it to breach the fundamental principle of the statute itself”.

5. There are many other types of seasonal employment in Ontario besides construction, such as summer resorts, amusement parks, exhibitions, ski resorts, logging, fishing, some types of

teaching, canning, tobacco and fruit harvesting to name a few. The majority of this panel of the Board attempts to characterize the canning industry as being similar or analogous to construction because, if I understand their reasoning correctly, once a specific crop is picked the job is done and the employees move on. It is at best a tortuous analogy and essentially just as inaccurate as if the comparison to construction were made with a summer resort or amusement park. The fields to be harvested each summer by Cobi Foods, the employer in this case, are the same fields planted year after year. They are, in the industrial sense, the employer's fixed plant and equipment which require the services of labour for several months of the year in the same way as the buildings and restaurants of a summer resort are the operator's fixed plant also requiring labour for only part of the year. Cobi's fields are not a project visited for a short time by a construction worker who, once the last nail is driven or the last brick laid, will never again work on the site. Employees harvesting and packing the production from Cobi's fields may return year after year if they and the employer so agree. Their job is never "finished" in the sense that a construction project is finished. Their work is no more "finished" than a school teacher's who faces a new "crop" of students at the beginning of each academic year. The place of employment of such cyclical or seasonal employees remains the school, the amusement park or the ski resort just as for the harvester it remains Cobi's fields and packing sheds. To hold, as does the majority, that the harvester's job is similar to a construction worker's because when one type of crop is picked his job is done and he then moves on to the next ripe crop, is to mischaracterize the nature of the harvesting employment. The individual harvester *employee* may be itinerant, as may be a construction worker, but unlike the latter's the harvester's job site is not; it remains Cobi's fields. It is useful to recall that it is "employees" in a generic sense who are in specific job classifications, not the individual employees themselves, which are defined in a bargaining unit. Job classifications comprise a bargaining unit and once those classifications are defined, certification procedures take a once-only snapshot of the employees in those job classifications at a fixed date for purposes of determining the percentage who hold union membership. If it were otherwise, if it were based on specific employees, a bargaining unit would gradually erode and eventually disappear as employees resign, retire or otherwise leave their jobs. Thus the fact that there may be high turnover of employees in those job classifications is irrelevant except for purposes of determining an appropriate date for taking the snapshot. High turnover among harvesters does not make their employment or their job classifications within a bargaining unit analogous to construction.

6. Until now, this Board has not compared other types of seasonal or cyclical employment to the construction industry in order to deny a representative group of employees an opportunity to decide for themselves whether or not they wish to be unionized. In *Island of Bob-Lo Company* [1970] OLRB Rep. May 211, a termination application was before the Board with respect to an amusement park which operated only during the summer months. At the time of the application only two of the regular summer complement of 13 employees had so far been hired. The Board held that since it was clear that the employer was in the usual process of building up within a reasonable time to his full seasonal employment complement, the vote on decertification should be delayed until a more representative number of employees were available. This was consistent with the view taken earlier in *Cochrane Industries Limited* 65 CLLC, 16,034 where the Board held that the build-up principle must be applied equally to both certification and decertification applications.

7. This Board has dealt with seasonal employment patterns in other instances as well. The majority refers to the Queen's University case (*Queen's University of Kingston* [1982] OLRB Rep. May 753) but claims, quite incorrectly in my view, that the precedent is inapplicable because it involved a pre-hearing vote application. I submit that that is a difference without substance since the case deals directly and unequivocally with the issue of representation rights in seasonal employment. The certification application had been filed during the summer on behalf of graduate students employed at the university when the number of such students was at a low ebb compared

to the winter months. The Board decided to hold a representation vote but noted that the persons in the proposed unit at the terminal date were not representative of the persons generally employed in the unit during the normal university year of September to April. As a consequence the Board decided to defer the vote in order not to disenfranchise a substantial number of employees who would have to work under the labour relations regime determined by the outcome of the vote. The Board said at paragraph 13:

Although we are concerned that deferral of a pre-hearing representation vote will delay the processing of this application somewhat, we are nevertheless of the view that an approach similar to that adopted in the *Bob-lo* case should be applied by the Board in the circumstances of this case in order to avoid unreasonably disenfranchising a very substantial number of employees who will have to work under the labour relations regime determined by the outcome of the vote. Accordingly, having regard to the cyclical and relatively high turnover aspects of employment in the university graduate (and undergraduate) student context in which this case arises, the Board is of the view that the proper balancing of the various labour relations interests involved in the case requires that the taking of a pre-hearing representation vote... be deferred until October of 1982, when a representative number of employees will be in the bargaining unit so that the Board can properly satisfy itself, within the scheme of free employee choice and majority representation established under the Act, as to whether or not a majority of the [sic] those in the unit desire to be represented by the applicant trade union in their employment relations with the respondent....

Note the similarity to the instant case of "the cyclical and relatively high turnover aspects of employment" in considering an appropriate date for a representation vote. Note too that the Board decided to postpone a pre-hearing vote which it normally would be much more reluctant to do than to postpone a post-hearing vote as in the instant case. Notwithstanding the greater sense of urgency in pre-hearing vote applications, the Board in *Queen's University* did not lose sight of the fundamental principle of majority rule.

8. The Board followed that precedent in the case of the *University of Windsor* [1983] OLRB Rep. Mar. 478, where there had been a significant increase in the number of part-time office and clerical employees between the date on which the union applied for certification and a few weeks later when the academic year got underway. As the Board noted in paragraph 9:

...Nor is this surprising since the University's full range of activities is ordinarily carried on between September and May, while the summer months are relatively quiet. But because the union applied for certification during the summer, if we were to consider only the support of the individuals employed at that time, a minority would govern the collective bargaining destiny of the much larger group employed only a few weeks later when the University resumed its regular activities. And, on the evidence before us, we cannot conclude that the minority employed on the application date form a representative core about which the much larger group fluctuates, so that it would be appropriate to base our decision solely on the wishes of the minority. In these circumstances, therefore, the Board has determined that the most appropriate disposition of this case is by means of a representation vote. However, that vote should obviously take place very soon since the end of the school year is rapidly approaching.

The majority offers no explanation for ignoring this further and consistent precedent of applying the build-up principle to seasonal employment.

9. As I have reasoned earlier, there is neither a factual nor logical basis on which to compare Cobi's harvesting and packing operations to construction. Even if there were, outside the construction industry the Board cannot ignore an imminent employment build-up, consideration of which has been endorsed and mandated by the Supreme Court in respect of legislation whose fundamentals are similar to the Act's. Nor should the Board now ignore its own clear precedents dealing with seasonal employment, some of which have been quoted above. The build-up principle should be applied to this case just as it has been to others where the tests developed by the Board

over time have been met. In summary, those tests associated with the build-up principle are that before deferring certification the Board must be satisfied that:

- (a) the present employees do not constitute a representative segment of the workforce to be employed within the bargaining unit; generally the Board considers 50% of the projected workforce in a representative number of the eventual job classifications as being a representative segment of the bargaining unit;
- (b) the build-up of employment is planned within a reasonable time. "Reasonableness" clearly must depend on the circumstances of each case. (In *Vulcan Equipment* [1974] OLRB Rep. May 285, seven months was considered reasonable; in *United Asbestos* [1974] OLRB Rep. Apr. 234 build-up over sixteen months was allowed. A build-up between one and five years was not accepted in *Wix Corporation Limited* [1975] OLRB Rep. Aug. 637); and
- (c) the build-up does not depend upon factors beyond the employer's control, for example, market conditions.

10. In applying those criteria to the instant case there is no evidence before us to suggest that market conditions would affect the build-up. Employees are added at about the same time each year depending upon the ripening dates for each different crop which is harvested and packed when ready, regardless of market conditions. Nor is that harvesting process stretched over an extended period of time; it starts in late June or early July each year, peaks in late August or early September and ends in October. Thus the facts in this case fall clearly within and easily meet the Board's stringent but normal build-up tests (b) and (c) above. The build-up does not depend upon market conditions but upon inexorable crop ripening dates, and peaks within two months.

11. With respect to the first criterion, (a) above, we have no evidence before us about the number of different job classifications within the proposed bargaining unit. However, from other agreed facts it can be inferred that the employment build-up is into job classifications similar to those held by earlier hires. That is, when the company adds to its crew, it is likely hiring people with the same skills as those already at work. It simply wants more of the same kinds of people rather than persons with different skills to be assigned to other different or new classifications. I am satisfied that the people at work on the application date were in job classifications likely to be representative of those to be found a few weeks later when the number of employees had tripled.

12. The only remaining element to be determined is whether or not 50% of the projected workforce was in place at the time the application was made. In accordance with the accepted facts (said by the company, without challenge, to be representative of other years as well) the employment pattern off full and part-time employees in the 1986 harvesting season was as follows:

Early June - no employees
 July 31 - 34 employees
 August 10 - 83 employees
 August 30 - 99 employees
 September 15 - 99 employees
 Late October - no employees

The build-up occurs since the ripening dates for different types of crops overlap. The union's application was made on July 31 when only one-third of the projected workforce was on hand. Giving

the union the benefit of applying to it even the Board's minimal criterion of just 50% of the workforce as being representative of the bargaining unit, the unit should comprise no fewer than 49 employees to qualify for possible certification. Since the number of employees on the application date (34) fell far short of the minimum, this element of the Board's build-up test also indicates that certification should be delayed. The facts of this case thus meet all three of the Board's major tests for deferring certification in a build-up situation.

13. The union filed membership evidence on behalf of 23 of the 34 employees in the bargaining unit at July 31. That number of union members is only 47% of the 49 employees who must be regarded as the very minimum number required for certification purposes. Under section 7(2) of the Act the Board is required to order a certification vote when union membership support is "not less than 45 per cent and not more than 55 per cent of the employees". In such circumstances the Board cannot grant, as it has done here, automatic certification since the union is not representative of the majority of employees.

14. As noted in the *University of Windsor* case, (*supra*), when faced with a certification application for a seasonal group of employees the Board must act with alacrity if it is to conduct a certification vote "in season". In the instant case the union first applied on July 31, 1986 for a unit of part-time employees. A differently constituted panel of this Board accepted the union's request to amend its application to an "all employee" unit. That decision was rendered August 29, 1986 and the amended application came to this panel for hearing on September 26. Even if this panel had that day ordered a representation vote, it is doubtful it could have been held while at least 50% of the workforce was still employed and available to vote. On the other hand, if a delay in processing its application before the Board had not occurred as a result of the union requesting to amend its own application, it is likely a vote could have been held near mid-September when a representative group of employees was still at work. Now, in June 1987, attempting to resolve the issue by certification without a vote is not the solution.

15. The correct decision, I submit, is for the Board to use the authority which it has under the Act to exercise its own discretion for determining both the *timing* of a representation vote and *which employees* shall be eligible to cast ballots in such a vote (see section 103(2)(f) of the Act and section 68(a) and (c) of the Board's Rules of Procedure). In accordance with that authority the Board should order a vote to be held during the week of August 10th 1987, when, in accordance with the employer's past practice based on crop ripening dates outside his control, a representative group of employees will be at work in the agreed bargaining unit and should be declared eligible to vote.

16. In summary, I would order such a vote under section 7(2) of the Act since at the application date the union had membership support of 47% of the employees in the appropriate bargaining unit. I believe the majority errs in law by concluding that only one-third of the employees comprise an appropriate bargaining unit in the face of the undisputed facts of a rapid and substantial build-up in employment, by concluding that because the employment of these employees is seasonal they are therefore analogous to construction workers to whom the build-up principle need not apply, and by ignoring without foundation the Board's clear precedents for dealing with build-up among seasonal employees. The Board lacks jurisdiction to ignore a build-up of seasonal employees elsewhere than in construction and violates the basic premise of the certification process under the Act by certifying the union based on a transitory majority calculated at an inappropriate date. I find from the facts and the law that this case is one where the build-up principle must apply, that the criteria for application of that principle have all been met by the agreed facts, and conclude that given the lengthy delay between the hearing date of September 26, 1986 and the date of

this decision, and taking cognizance of the 1987 crop season, the Board should use its authority to order a representation vote of employees in the bargaining unit in the week of 10th August 1987.

0176-87-R Jorge Silva, Applicant v. Labourers' International Union of North America, Local 1059, Respondent v. Co-Fo Concrete Forming Construction Limited, Intervener

First Contract Arbitration - Practice and Procedure - Termination - Termination application filed the day before the Board issued a decision directing settlement of a first contract by arbitration - Application ought to be considered subsequent to the application for a direction on the ground that the panel seized with the first contract application had nearly completed its hearing of that application - Since first contract application granted, Board required to dismiss termination application

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *J. Wilson* and *R. Montague*.

APPEARANCES: *John H. McNair* and *Jorge Silva* for the applicant; *L. A. Richmond*, *J. MacKinnon* and *C. Pike* for the respondent; *Peter F. Chauvin* and *Marie Miszczak* for the intervener.

DECISION OF THE BOARD; June 5, 1987

The Board delivered the following decision orally at its hearing in this matter on May 27, 1987:

This is an application filed on April 21, 1987 under section 123 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent.

An application was made on March 30, 1987 by the respondent in this case for a direction to settle a first collective agreement under section 40a of the Act. The first contract application was heard by the Board, differently constituted, on April 15, 16, 21 and 22. That panel of the Board issued a decision directing settlement of the first contract by arbitration on April 22, 1987.

The respondent herein was certified in October 1985 and the Minister advised the parties that he did not consider it advisable to appoint a board of conciliation on June 13, 1986.

Section 123(1) of the Act states:

"If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit."

All parties before us agreed that this application may be entertained by the

Board, but counsel for the respondent submits that section 40a(22) directs the Board to dismiss this application. Section 40a(22) provides:

“Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and
- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.”

The panel of the Board seized with the application that was made under section 40a did not have the instant application before it on April 22, 1987, although it was filed with the Board on April 21, 1987. Counsel for the applicant submits that the Board cannot deprive employees of the right to have this application for a declaration heard without having considered what order to deal with this application and the application for a direction under section 40a. Counsel submits that the Board did *not* consider this application when it gave its decision on April 22, 1987.

Section 102(9) of the Act states:

“The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.”

In this case, this panel of the Board has before it an application filed during the course of a hearing in an application for a direction under section 40a. Section 40a contemplates that this circumstance might arise, and permits the Board to deal with it. We have the jurisdiction to consider the appropriate order of dealing with these applications by virtue of section 102(9) of the Act.

In our opinion, given the time of the filing of the instant application, in the midst of the hearing of the application made under section 40a, it appears to us that this application ought to be considered subsequent to the application for a direction under section 40a. We do so principally on the ground that the panel seized with the application under section 40a had nearly completed its hearing of that application. An application affecting the right of a trade union to represent employees in a bargaining unit requires time to process under the Board's Rules of Procedure since a terminal date must be fixed and notices to employees must be posted. We do not think it is appropriate to suspend the continuation of a hearing in a section 40a application in order to process the kind of applications contemplated by section 40a(22)(a) and (b).

Therefore, we hereby find that it is appropriate to consider this application

after the application for a direction settling the first collective agreement by arbitration was considered by the Board.

Having made that determination, the latter portion of section 40a(22), which states:

“... if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.”,

directs the Board to dismiss this application.

Therefore, for the reasons aforesaid, this application is hereby dismissed.

2838-86-R United Brotherhood of Carpenters & Joiners of America, Local #494, Applicant v. 608322 Ontario Inc. Delco Contractors, Respondent

Bargaining Unit - Certification - Construction Industry - Test to determine whether employee performing bargaining unit work - Departure from representative period test limiting line of questioning - Employee not spending the majority of his time doing bargaining unit work on application date - Unnecessary to consider any other factor - Application dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. H. Wightman* and *D. A. Patterson*.

APPEARANCES: *N. L. Jesin* and *Jim Caron* for the applicant; *Theodore Crljenica*, *Alphonso Fanelli* and *Mario Mancini* for the respondent.

DECISION OF THE BOARD; May 29, 1987

1. This file, as well as File Nos. 3098-86-R and 3099-86-U, were listed for hearing on the same date. This is an application for certification by the applicant (or “Local 494”) made pursuant to the construction industry provisions of the *Labour Relations Act* (“the Act”). The parties agreed that Files No. 3098-86-R (an application under subsection 1(4) of the Act) and 3099-86-U (a complaint under section 89 of the Act) should be adjourned pending the disposition of the application for certification. This decision therefore deals only with the application for certification.

2. The Board finds that the applicant is a trade union within the meaning of paragraph 1(1)(p) of the Act.

3. Having regard to the agreement of the parties, the Board finds that

all carpenters and carpenters’ apprentices employed by the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board Area 1, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons

constitute a unit of employees of the respondent suitable for collective bargaining.

4. Initially, the employer filed a list of six employees. This list appears to include *all* the employees in the respondent's employ as of January 13, 1987, the date of application, and not only those employees the respondent considered to be employees in the applicant's proposed bargaining unit. The applicant maintained there were two employees in its proposed unit. After discussions between the parties and a Labour Relations Officer, the employer in a letter dated February 3, 1987 (and received by the Board on February 10, 1987) deleted four employees from the list, adding at the bottom "To the best of my knowledge, the only employees in the bargaining unit are Filiomeno Fiorito and possibly Paul Garneau". The applicant was of the view that Paul Garneau was a carpenter. Counsel for the applicant contends that the issue of Mr. Garneau's status was settled at the officer's meeting and that the employer re-opened it only after the applicant filed its application under subsection 1(4) of the Act.

5. Having considering the submissions of both counsel and the documents in the file, we made the following oral ruling:

We are not satisfied that the employer has ever conceded that Garneau is a carpenter properly within the unit. At most it has conceded Garneau might be in the unit. Since the respondent has maintained this position throughout, we are of the view that this is not a reopening of the issue but a maintenance of the employer's position that Garneau has not performed carpentry work exclusively. Accordingly, we conclude that it would be the appropriate course to hear evidence today of the work performed by Garneau.

6. Prior to our hearing evidence on the status of Mr. Garneau, the parties agreed that the applicable test was that articulated in *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his time doing on the date of application; or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

7. Accordingly, the evidence led related primarily to the work performed by Mr. Garneau on January 13, 1987, the date of application. As another relevant factor, evidence was led with respect to the basis upon which Mr. Garneau was hired. Evidence of work performed by Mr. Garneau at other times was restricted to the general nature of the work; the parties were not permitted to ask questions about the proportion of particular types of work performed. In our view, to permit that line of questioning would detract from the intent of the *Gilvesy* case, *supra*, to clarify that the test is the work performed on the date of application and not during a representative period. That case signals a departure from the representative period test employed in cases such as *Heath Construction Inc.*, [1977] OLRB Rep. Oct. 691; *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423; and *Di Marco Plumbing and Heating Company Limited*, [1985] OLRB Rep. May 659 where the date of application test did not provide an adequate answer.

8. Paul Garneau has been a member of Local 494 for seventeen years. He started work at the Howard and Niagara apartment complex project at the end of November 1986 and finished work at the site on January 16, 1987. His separation slip, completed by Alphonso Fanelli, a supervisor with the respondent, shows his occupation as "carpenter". We are also satisfied that he performed carpentry work on the site and had previously performed carpentry work extensively.

9. Our initial (and, in the event, exclusive) concern, however, is the nature of the work Mr. Garneau performed on January 13, 1987. One particular issue is central to our determination. Because the columns on the first floor had been built too high, they had to be chipped down after the forms were removed. When this chipping took place was dealt with extensively before the Board since the chipping occupied the greatest part of the work performed on the days it occurred. Counsel for the union conceded that Mr. Garneau would have to be doing work other than chipping to be doing carpentry work.

10. Chris Mayer is the architect's agent on the construction site; he attends every day and writes short written reports on the progress of the work which he submits to the architect. His reports do not exhaustively set out all the work done on a particular day, nor do they indicate which employee performed any particular work. Furthermore, he attended at the site Monday to Friday only and did not necessarily record work done on the weekend. His reports were typewritten from handwritten notes. Both the typewritten and handwritten versions were submitted as evidence.

11. Mr. Mayer testified that he did not realize the columns were too high until January 12, 1987 and that chipping occurred that day and on January 13 and up to 2:30 p.m. on January 14, 1987. His typewritten reports show that beam pickets were chipped on all columns on January 12 "due to oversight" and that chipping was "going on all day long" on January 13 and that it was completed at 2:30 p.m. on January 14, 1987.

12. Mr. Mayer's handwritten notes contradict his oral testimony and the typewritten reports. On the back of the note for January 7th, he wrote "something looks funny [...] check columns tomorrow". That note actually was made on January 6th (the Tuesday). On the back of the January 9th (that is, Friday) note, he had written

due to oversight on my part, something was wrong on column heights. because in daily report I forgot to mention columns are to [sic] high they have to be chipped down 8' do not report today leave for Monday.

In fact Mr. Mayer testified he brought this problem to Mr. Mancini's attention before the Monday but Mr. Mancini did nothing to correct it immediately. In cross-examination, he admitted that at least two columns were chipped on Friday, January 9th, but could not remember why he did not note it. He said, however, that it was not possible that more than two columns were chipped by January 9th because only two columns needed to be chipped that day. He conceded that it was possible other columns were chipped on the Saturday or Sunday, January 10th or 11th.

13. Mr. Garneau at first testified in cross-examination that the columns were chipped on the 13th but then said he did not know when chipping was done. He also said that his last day, January 16, 1987, was two to three days after the chipping work. His recollection of when the chipping was done - either during his last week of work or during the previous week - was confused. In addition, Mr. Garneau at first said it took one day to do all the chipping, but later extended that to "two days at the most, one and a half, not three". Jim Caron, the business representative of Local 494 for three years, who visited the site on January 13, 1987, testified he saw no chipping being done on the 13th. Filiomeno Fiorito, another employee (agreed to be a carpenter) and a member of Local 494, testified the chipping was done on the 12th, 13th and 14th by Mr. Garneau, Danny Mullen and Mario Mancini.

14. Mr. Caron and Mr. Fiorito were both believable witnesses, but they contradicted each other. While, neither Mr. Mayer nor Mr. Garneau gave completely satisfactory testimony with respect to when the chipping occurred, considering all the evidence and weighing the testimony of

the various witnesses, particularly that of Mr. Mayer (including his notes), we are satisfied the chipping took place over a three-day period. We are also satisfied that Mr. Garneau worked primarily on chipping when it occurred, and that chipping took place on January 13, 1987.

15. Accordingly, applying the *Gilvesy, supra*, test, we find that Mr. Garneau was employed by Delco Contractors and was at work on the date of the application; however, we find further that Mr. Garneau did not spend the majority of his time doing carpentry work on the date of the application, January 13, 1987. It is not therefore necessary for us to consider any other factor.

16. Since our finding leaves only one employee in the bargaining unit, this application is dismissed pursuant to subsection 6(1) of the Act.

17. The application under subsection 1(4) is no longer relevant and is hereby terminated. This matter is referred to the Registrar to schedule a hearing date for the union's section 89 complaint.

2298-86-R International Brotherhood of Electrical Workers, Local 1687, Applicant v. Raymond Brisson c.o.b. as **Eighty-Five Electric**, and Richard Tominski c.o.b. as R. T. Electric, Respondents

Bargaining Rights - Collective Agreement - Construction Industry - Related Employer - Sale of a Business - Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit - *Nicholls-Radtke* distinguished - Employer had no present or future need for employees when collective agreement signed - No valid collective agreement - Sale and related employer issues academic - Application dismissed

BEFORE: Paula Knopf, Vice-Chair and Board Members R. M. Sloan and B. L. Armstrong.

APPEARANCES: Mark Zigler and Larry Lineham for the applicant; Ray Brisson for the respondent Raymond Brisson c.o.b. as Eighty-Five Electric; Michael Horan, R. Tominski and C. Tominski for the respondent Richard Tominski c.o.b. as R. T. Electric.

DECISION OF THE BOARD; June 22, 1987

1. This case involves an application under sections 63 and 1(4) of the *Labour Relations Act*. The applicant union is seeking a declaration and associated relief under the claim that it holds bargaining rights for the employees of the respondents and that the respondents are bound by the Provincial Agreement, are one employer for the purposes of the collective agreement and are or were carrying on associated or related businesses or activities under common direction and control.

2. The Board heard four days of evidence in this matter. However, at the end of the day, there were few factual disputes. The relevant evidence can be summarized as follows.

3. Richard Tominski has been a journeyman electrician since approximately 1972. He became a member of the applicant union in or around 1973/74 and was placed in employment by Local 1687's hiring hall in the Sault Ste. Marie area. Initially, that provided the bulk of his income.

However, Mr. Tominski also derived income from what he describes as “moonlighting” or work done and obtained on his own without the involvement of the union. This included residential and some service or light industrial or commercial work. He did this work under the name R. T. Electric since 1979. However, he has never registered or incorporated the name of that company. Neither his net nor his gross incomes from this work was substantial at the beginning. The net incomes were less than \$10,000 until 1984. But, in 1984, this changed. Mr. Tominski had been working for a company named Quinn-Robb in 1984. But during that summer the company “folded up” due to financial problems. Mr. Tominski was not receiving enough work from the union referrals to fulfill his needs. So he went back to work on his own as R. T. Electric and began to earn considerable income in this capacity. R. T. Electric consisted solely of Mr. Tominski. Up to this point, there is no evidence that he ever hired any other electricians. He only employed unskilled help on the odd occasion to assist and clean up. All his books and records were prepared meticulously by his wife and were filed as exhibits before this Board.

4. One of the partners in the collapsed Quinn-Robb Electric was Roy Brisson. Mr. Brisson, like Mr. Tominski, had also operated on his own as an electrician. He too had done residential and service work outside of the referrals he received from the union. In the early stages, Tominski and Brisson operated completely independently. But, in early 1984, as Mr. Brisson was having financial difficulties and trying to build up his private business, the Tominski family helped Mr. Brisson out by having Mrs. Tominski do Mr. Brisson’s bookkeeping on a fee for services basis. Mr. Tominski and Mr. Brisson also assisted each other on various jobs as required. When this occurred, they paid each other at hourly rates.

5. However, in the latter part of 1984, tenders were solicited on a substantial electrical contract at Sault College. Mr. Tominski had no experience with preparing tenders. So he acquired Mr. Brisson’s assistance and they prepared a tender for this job. The tender was submitted in the name of R. T. Electric and succeeded in obtaining the contract. Mr. Tominski then financed the project but worked together with Mr. Brisson throughout.

6. It was R. T. Electric which signed the contract with the general contractors on the Sault College project. Mr. Tominski assumed he was assuming full responsibility towards the liability for the project. He and Brisson then completed the job together. The arrangement they had was that during the course of the project, they would draw an hourly wage based on the rate contained in the tender. Mr. Tominski would finance the project by buying materials and supplying the bulk of equipment. Then, at the end of the day, after an accounting was done, giving full compensation for the use of Mr. Tominski’s tools, equipment, overhead and materials, the two men would evenly split whatever profits remained.

7. Then in the spring of 1985, Mr. Brisson heard about a construction site in Sudbury involving electrical work on the LaSalle Square Mall project. On his own, Mr. Brisson put in a quote and obtained the work. He then called upon Mr. Tominski to assist him on the same basis that they had worked together at Sault College. Again, Mr. Tominski provided the finances and the credit available to fund the project because Mr. Brisson was still in financial difficulties. However, as Mr. Brisson had bid for and obtained the contract on his own, the contract was done in the name of his company and all his dealings with the contractor on the project were done through Mr. Brisson alone. In order to complete the project, Messrs. Brisson and Tominski travelled to Sudbury in the beginning of May on Thursday evenings and stayed until Saturday night. On the Mondays to Thursdays of the same weeks, Mr. Tominski worked on his own on his private contracts in Sault Ste. Marie.

8. On Friday July 26, 1985, events occurred which constitute the only real factual contro-

versy in this case. We had the benefit of the testimony of Mr. Tominski, Mr. Brisson and Larry Lineham, the union's Business Representative for the area. After considering the demeanour of the witnesses, the plausibility of their stories and the consistency with the rest of the evidence, we have concluded that the following occurred.

9. Mr. Lineham had heard that Mr. Brisson was working on the LaSalle Square project without a union contract. Mr. Brisson was a member of the I.B.E.W. and the union constitution required that all members who acted as contractors must sign collective agreements with the union. Mr. Lineham also felt that the work fell within the jurisdiction of the union. Mr. Lineham had contacted Mr. Brisson earlier and had solicited his co-operation in having a collective agreement signed to cover Mr. Brisson's work. After some delays, arrangements were made so that Mr. Lineham would come to the LaSalle Square site on July 26. On that day he found both Messrs. Brisson and Tominski doing some electrical work. Mr. Tominski perceived Mr. Lineham to be angry at the time because Brisson and Tominski were working without notice to the union. It is clear that Mr. Lineham was upset with Mr. Brisson and Mr. Tominski for working without a union contract when so many members were out of work and when the union constitution required members to sign contracts if they became contractors as it appeared had been done by Messrs. Tominski and Brisson. After some discussion in which Mr. Lineham mentioned that he would prefer union charges against the two men, Mr. Brisson and Mr. Lineham left the work area to go up to the construction office on the site. Mr. Tominski was on top of a ladder at the time and was in the middle of doing some work. It is agreed by all that he may not have heard all the conversations between Mr. Lineham and Mr. Brisson. In any event, the latter two gentlemen went to the construction office where Mr. Brisson executed a collective agreement with the union on behalf of his company, Eighty-Five Electric. Mr. Brisson said that he had always intended to sign such an agreement. After this was done, and after Mr. Tominski finished working on the top of the ladder, he joined Mr. Lineham and Mr. Brisson in the office. Mr. Tominski said that the 'contract book' or collective agreement was open on the desk and he was told by Mr. Lineham to sign the paper. Mr. Tominski says that the words "Eighty-Five Electric" were written on the signature page but he noticed nothing else. He then signed his name beside the name of Ray Brisson. Mr. Tominski says that the reason he signed was to avoid the union laying charges against him and to avoid being thrown off the job. After signing, the three men went off to lunch together along with the general contractor for the site. He also claims that he believed that by signing under the words "Eighty-Five Electric", his signature would not be binding upon him personally because he did not own Eighty-Five Electric or have anything to do with it.

10. It is clear that Mr. Lineham and Mr. Brisson had discussions that day about the immediate and future plans of Eighty-Five Electric. Some of the discussions were in the presence of Mr. Tominski and some were not. Mr. Brisson did not recall his discussions with Mr. Lineham about Mr. Tominski's involvement or lack thereof in Eighty-Five Electric. But Mr. Brisson recalled telling Mr. Lineham that if and when Eighty-Five Electric got any bigger jobs, it was his intention to hire union members. At the point that the contract was signed, there were no bigger jobs lined up nor were there any prospect of the need to hire any electricians to work on the LaSalle Square job. None had been hired to date. Mr. Lineham made it clear in his evidence that he considered that both Mr. Tominski and Mr. Brisson were acting as contractors on the LaSalle Square project and signing as such. Mr. Lineham says that Mr. Tominski told him that he and Mr. Brisson were partners on the project. Mr. Tominski denies this statement. But it was on the basis of that representation that Mr. Lineham claims that he decided to treat Mr. Tominski as a contractor on the job rather than an employee.

11. There is some dispute about when Mr. Tominski became aware of the name Eighty-Five Electric that was used by Mr. Brisson. Mr. Brisson claims he told Mr. Tominski that Eighty-

Five Electric had been registered as a corporate name in early 1985 and that Mr. Brisson certainly knew about this by May of 1985 when they began work on LaSalle Square. But the bank cheques that were filed in evidence showed that Mr. Tominski paid Mr. Brisson by cheque in Mr. Brisson's name until late August of 1985 and then began to have cheques made out to Eighty-Five Electric for work done for Mr. Tominski by Mr. Brisson. Mrs. Tominski confirms this evidence. However, certainly the name Eighty-Five Electric was made known to Mr. Tominski at the time he signed the document with Mr. Lineham and Mr. Brisson which is alleged to be the binding collective agreement between the union and Eighty-Five Electric.

12. After July of 1985, Messrs. Brisson and Tominski completed the LaSalle Square Mall project. There is no evidence that they ever hired any employees on that project.

13. After the work was completed on the Sault College job, Mr. Tominski and Mr. Brisson continued to work independently of each other. Mr. Tominski was working full-time under the name R. T. Electric. As before, if either man needed help on individual jobs, they would call on each other and pay each other on an hourly basis.

14. After the LaSalle Square project, Mr. Tominski continued to work independently as R. T. Electric. He obtained large and small jobs on his own. He bid for a job at Plummer Hospital on his own and won the contract. He also obtained a substantial contract working on a Shoppers Drugmart that seems to have required him to hire employees. But he never worked again in any kind of relationship with Mr. Brisson. Mr. Tominski claims that there was too much conflict between him and Mr. Brisson on the way the jobs were run. The evidence also shows that even to this date, the two men have not settled their accounting regarding the two projects that they did work on together on a profit-sharing basis. But for whatever reason, the evidence discloses no financial or working relationship between Mr. Brisson and Mr. Tominski after the completion of the LaSalle Square project in the summer of 1985. The two men and their two companies operated independently, banked separately, used separate bookkeepers and accountants as well as separate equipment at all times except for the two profit-sharing projects. Even during the course of those projects, they maintained separate accounts, bookkeepers and accountants and the sharing of equipment was factored into the equation of how much profits would be left to share.

15. Mr. Tominski has never made any remittances as an employer to the union or considered himself bound to the union by way of the collective agreement he signed in July of 1985. But in or around October of 1985, Mr. Lineham came to Mr. Tominski at the Shoppers Drugmart site and asked Mr. Tominski to sign another union contract in the name of R. T. Electric. Mr. Tominski made arrangements to meet with Mr. Lineham later at Mrs. Tominski's place of business. When they did meet there later, Mr. Lineham asked Mr. Tominski to sign a contract with the union under the name of R. T. Electric and implied that charges would be laid under the union constitution if Mr. Tominski failed to comply. Mr. Lineham expressed concern to Mr. Tominski over the Plummer Hospital project and felt that Mr. Tominski should have hired union employees on that job. Mr. Lineham explained to the Board that although he considered Mr. Tominski and his company bound by the signatures on the July 28 contract with Eighty-Five Electric, Mr. Lineham wanted Mr. Tominski to sign another contract under the name of R. T. Electric so as to avoid having to bring proceedings before the Ontario Labour Relations Board once it became apparent that Mr. Tominski did not consider himself bound by the first signature on the Eighty-Five Electric contract. Mr. Lineham also claims that Mr. Tominski stressed that he and Mr. Brisson were "no longer partners". Mr. Lineham considered this as an admission that Mr. Tominski and Mr. Brisson were once partners and that Mr. Tominski and his present company were therefore bound by the bargaining rights that the union obtained in contract with the Eighty-Five Electric signed in July of 1985. Again, Mr. Tominski denies ever admitting that he was ever a partner of Mr. Brisson's.

16. The Tominskis managed to put Mr. Lineham off in the meeting of October 1985 by promising to think about signing a new agreement with the union. However, after that, Mr. Tominski failed to answer any of the many telephone messages and enquiries left by Mr. Lineham in an attempt to contact Mr. Tominski. Mr. Tominski then withdrew from the union's Health and Welfare Plan in mid October and decided to rescind his membership from the union. He did resign by a letter which ultimately reached the union on December 3, 1985. The letter of resignation also contained the following sentence:

This will also bring to an end my association with Eighty-Five Electric.

On December 16, 1985, Mr. Lineham preferred charges against Mr. Tominski for failing to sign a collective agreement for R. T. Electric. The hearing date of January 24, 1986 was set. Mr. Tominski did not attend or send in a letter of defence. He was found "guilty" by the union and assessed a fine of \$1,000 for being a union member and failing to sign an agreement with the Local within thirty days of becoming an electrical contractor.

17. Mr. Tominski appealed this fine through the agency of a local lawyer. The lawyer sent in a letter of appeal citing as one ground of appeal:

Mr. Tominski was *no longer a partner* of Eighty-Five Electric nor was he actually established as an electrical contractor under the name R. T. Electric.

[emphasis added]

This sentence and representation were repeated in another letter from the same lawyer to the union dated February 13, 1986. A further letter to the union from the same lawyer dated February 24, 1986 reads in part:

With respect to R. T. Electric, we have already informed you that *the said partnership* did not actually come into being until after Mr. Tominski resigned his membership.

[emphasis added]

This latter representation by the lawyer for Mr. Tominski is extremely curious in that the Tominskis have continually denied any partnership with R. T. Electric and certainly by the time Mr. Tominski had resigned his membership with the union he claims that there was no longer any form of relationship between Mr. Tominski and Mr. Brisson or his company. In any event, the International Vice-President of the union dismissed Mr. Tominski's appeal in a letter dated November 5, 1986 on the grounds that Mr. Tominski had not complied with the union's appeal rules which require payment of the assessed fine before the appeal can even be entertained.

18. Despite the language used by his lawyers in the correspondence with the union, Mr. Tominski denies that there ever was any form of legal partnership with Mr. Brisson. Mr. Tominski describes the Sault College and LaSalle Square projects as "joint ventures" and their work arrangement as simply a fee for services arrangement. He says his lawyer at that time did not know much about labour law and for that reason Mr. Tominski ultimately discharged the local lawyer and decided to retain Mr. Horan for these proceedings.

19. One of the other factors that should be mentioned is that in the course of the cross-examination of Mr. Lineham, it was revealed that the union had undertaken to Mr. Brisson that no matter what the outcome of these proceedings, the union would not be looking to Mr. Brisson for a claim of damages. The Board wishes to emphasize that we infer nothing sinister from this although we were invited to do so by counsel for Mr. Tominski. The importance of that evidence to the Board was simply that Mr. Lineham stressed that the union's position with regards to Mr.

Brisson was based on the premise that the union had no real claim against Mr. Brisson for damages because Mr. Brisson had never employed any union members. However, the union wanted to proceed against Mr. Tominski because Mr. Tominski had apparently employed non-union electrical workers after July 1985 and yet had not acknowledged any responsibility under the collective agreement.

20. It is also important to note that Mr. Lineham acknowledges that at the time the Eighty-Five Electric collective agreement was signed by Messrs. Brisson and Tominski in July of 1985, Eighty-Five Electric had no employees. Mr. Lineham considered the two signatures as the signatures of employers only. Mr. Lineham's intention in getting the two signatures was to have, Eighty-Five Electric hire through the union office when, and if, it got enough work that it needed to hire electrical workers. But it was recognized that such hiring would only occur in the future if and when larger projects were obtained.

The Argument

21. Counsel for the union argued that Mr. Tominski and Mr. Brisson acted as partners in a legal sense and held themselves out to the public as such. The Canadian Encyclopaedia Digest section on partnership was cited to provide definitions of the term of partner. But, in any event, it was argued that the case does not depend upon the legal characterization of Mr. Tominski's and Mr. Brisson's relationship as partners or as joint venturers or anything else in particular. Instead it was said that Mr. Tominski and Mr. Brisson worked together on two projects with the agreement to share profits and thus worked as one entity. A collective agreement was signed during the course of this relationship that was said to bind them both when they later split up and went their separate ways. It was argued that upon the dissolution of that relationship, sections 63 and 1(4) require that the two signatories remain bound by their original agreement. It was also argued that the collective agreement signed by Mr. Brisson and Mr. Tominski was a valid collective agreement. Even if there were no employees in Eighty-Five Electric at the time of signing, this was said not to be fatal to the case because in the construction industry, the Board allows collective agreements to be signed without any employees in the bargaining unit where there is an intention to hire in the future. The Board was referred to the decisions in *Nicholls-Radtke & Associates Limited*, [1982] OLRB Rep. July 1028 and *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50. Further, it was argued that when Messrs. Tominski and Brisson went their separate ways, they both carried on the same business and both took with them the original entity's experience. Thus the situation was said to be covered by section 63 of the Act. The Board was referred to the decision of *Base Electric Co. Ltd.*, [1978] OLRB Rep. Feb 140 and *Construction P. H. Grager Inc.*, [1985] OLRB Rep. Feb. 233. Alternatively, it was argued that section 1(4) of the Act bound Mr. Tominski because the two independent contractors went their separate ways and set up two related businesses that were really the successors of the original. The Board was referred to *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945.

22. Counsel for Mr. Tominski characterized the case as one dealing with the question of the legitimate extension of bargaining rights. But he argued that the rights acquired in this case when the document was signed in July of 1985 were not legitimate bargaining rights. It was argued that Messrs. Brisson and Tominski were never partners and never held themselves out as such. Instead, each was in charge of their own job and simply helped the other out for a share of the profits in two larger jobs. This was said to negate the suggestion of common direction and control. Further, the fact that there were no employees when the document was signed and no immediate prospect of there being employees was said to mean that no collective agreement could come into force. In addition, it was argued that there was no indicia of sale of a business after the LaSalle Square job that would fall within section 63 of the Act. Alternatively, the Board was asked to exercise its dis-

cretion to deny granting a declaration of sale because of the method used to attempt to acquire the bargaining rights, the lack of intention on Mr. Tominski's part to formulate a collective agreement and the pressure placed upon Mr. Tominski by Mr. Lineham to sign by the use of laying internal union charges against Mr. Tominski. The Board was referred to the following cases: *Albert's Siding*, [1982] OLRB Rep. July 975 and *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308.

The Decision

23. At the outset of these proceedings, counsel for Mr. Tominski had invited the Board to dismiss the application by way of a preliminary matter on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the purported collective agreement had been signed at a time that there were no employees and no concrete expectation of hiring employees in the foreseeable future. The Board could not make such a ruling without hearing all the evidence in the case. But it is true that unless there were any valid bargaining rights created by the agreement signed in July 1985, then the union's application against the respondents cannot prevail.

24. By definition, a collective agreement is an agreement signed by a trade union that represents employees of the employer signatories to the document. (See section 1(c) of the Act.) Without employees in place, the Board has refused to recognize that a union can purport to sign a collective agreement. The main and obvious reason for this is simply that to allow otherwise is to invite employer participation in the formulation and or administration of a trade union and to deny the ultimate employees their choice of their trade union representative. This would clearly violate the letter and intention of section 48 of the Act which reads as follows:

An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purpose of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed colour, nationality, ancestry, age, sex or place of origin.

However, the realities of the construction trades are also recognized by the Board in sections such as section 121 which, under certain prescribed circumstances, allow a collective agreement to be deemed to exist notwithstanding that there were no employees in the bargaining unit at the time the agreement was signed. Section 121 reads as follows:

An agreement in writing between an employer or employers' organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employers' organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.

25. Further, beginning with *Nicholls-Radtke*, *supra*, the Board recognized that in order to accommodate the scheduling and the working realities of the construction industry, the union's hiring hall function had to be acknowledged and appreciated to be able to operate in such a way as to cause no offence to the protections inherent in section 48 of the Act. In the *Nicholls Radtke* case, *supra*, the company entered into an agreement incorporating a collective agreement between the General Contractors of the Construction Association and the union. At the time the agreement

was signed, the company had no employees. The agreement was signed on the understanding that the local union would supply workers when they were required. The hiring began within four days. The agreement showed on its face the intention to hire employees in the future. In that decision, the Board reviewed its previous case law that focused on the concern over employer support when agreements were signed before employees were in place. But in the *Nicholls-Radtke* case, *supra*, the Board concluded the document was signed in contemplation of members being employed on that project. Thus, the Board held that the union was simply acting in its capacity as a trade union in the construction industry trying to obtain work for its members rather than the employer trying to recruit members for the union. This was said to cause no offence to section 48 of the Act. Further, the Board was convinced that the employer needed someone to perform the work and that the union simply undertook to refer its members in exchange for voluntary recognition from the employer as the exclusive bargaining agent for those persons. This was said not to be equal to union support. The full analysis of the case bears repeating.

9. In view of the arguments put forward by the applicant and the intervener, the present case comes down to a very basic policy choice for this Board. Should the Board continue to follow the policy set out in the *C. Strauss* case, that the mere signing of a collective agreement, when there are no employees in the bargaining unit, of itself constitutes employer support for a trade union? The agreed Statement of Facts signed by the parties in this matter indicates in paragraph three that the agreement was signed on the understanding that Local 2693 would supply workers if and when requested to do so by the respondent to the project which would be commenced at a later date. In making such an agreement, the intervener was merely acting as a lot of construction trade unions do in attempting to obtain work for its members. In this regard, reference should be had to section 46 of the Act which deals with certain permitted provisions of collective agreements, in particular union security provisions.

Subsection 1 of section 46 reads as follows:

46.-(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) *for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;*
- (b) *for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;*
- (c) *for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.*

[original emphasis]

Subsection 4 reads as follows:

(4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions *requiring, as a condition of employment, membership in the trade union* that is a part to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,

- (a) where the trade union has been certified as the bargaining agent of the employees of the employer in the bargaining unit; or
- (b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year; or
- (c) where the employer becomes a member of an employers' organization that has entered into a collective agreement with the trade union or council of trade unions containing such a provision and agrees with the trade union or council of trade unions to be bound by such agreement; or
- (d) where the employer and his employees in the bargaining unit are engaged in the construction, alteration, decoration, repair or demolition of a building, structure, road, sewer, water or gas main, pipe line, tunnel, bridge, canal, or other work at the site thereof.

[original emphasis]

It is of course obvious that section 46(4)(d) uses the exact same language as clause 1(1)(f), the definition of construction industry in the Act. Taken together, subsection 1 and subsection 4 of section 46 can be said to contemplate as permissive, provisions in a construction industry collective agreement requiring as a condition of employment membership in the trade union. And further, the structure of subsection 4 seems to indicate that, in the construction industry, compulsory membership or a preferential hiring clause may be inserted into a first collective agreement signed when voluntary recognition creates the bargaining rights which the union holds. If the Act contemplates as permissive conditions in construction collective agreements, preference of employment for union members extending to membership in a trade union as a pre-condition of employment, are we to find that the signing of such an agreement in the absence of any other factor is to be interpreted as support for the trade union within the meaning of section 48(a)? In the *Sunrise Paving* case [72 CLLC ¶16,060], for instance, there was evidence upon which such a conclusion could be drawn. That is, the employer on hiring employees did the membership recruiting for the union. However, in the *C. Strauss* case, and in the present case, no such implication arises.

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11. In the *Sunrise Paving* case, the Board commented that "the employees of the respondent did not have an opportunity to select their bargaining agent". While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union's hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the stated policy of the Board in the *C. Strauss* case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site. Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervener on the 16th of October, when there were two members of the intervener union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

12. On the other hand, it may be argued that the *C. Strauss* case, simply recognizes a limitation on the acquisition of bargaining rights that is implicit in the Act, namely, there must be employees in the employ of the employer at the time bargaining rights are acquired. Obviously, this is so in the case of certification, but also in the case of voluntary recognition. In this regard the latent policy in the *Labour Relations Act* is implicit in section 121 of the Act which reads as follows:

“An agreement in writing between an employer or employers’ organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employers’ organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.”

That provision primarily recognizes that special circumstances are required for the construction industry due to the cyclical nature of employment in the construction industry. There may be times when an employer has no employees, but nevertheless as a matter of the on-going labour relations in the construction industry, the employer is bound by the results of collective bargaining. It would appear that such a provision which deems a collective agreement to be valid when there are no employees in the bargaining unit would only be necessary if in fact there was a problem with the validity of collective agreements signed when there are no employees in the bargaining unit.

13. It is our view, however, that when the document in the present case was signed on October 8th, 1975, the respondent and the intervener were performing two distinct, but related acts at the same time. The respondent employer was voluntarily recognizing the intervener union as the exclusive bargaining agent for employees in the bargaining unit, and contemporaneously agreed to certain terms and conditions of employment for those employees who would be affected by the recognition agreement. There would have been no arguable issue in this case as to the validity of the collective agreement if the respondent employer had signed it *after* the union’s members had reported for work. For this Board to hold that, in the circumstances of this case, where no other persons were working or had worked for the employer in the bargaining unit, *and* no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act.

14. The respondent employer required persons to do work for it, and went to the intervener union, who had members available to do that work, for those persons. In the same way that the Courts in the *Blouin Drywall* [(1975) 57 D.L.R. (3d) 199] and *Maritime Employers’ Association* [(1978), 89 D.L.R. (3d) 289] cases, held that members of a trade union who are not actually working for a particular employer but are associated with the union’s hiring hall to seek work are employees, the members of the intervener trade union on whose behalf the collective agreement was entered into are “employees” whom the union represents. Section 121 of the Act indicates that an agreement in writing which is signed when there are no employees in the bargaining unit is deemed to be a collective agreement if, for example, the union is renewing a collective agreement or making a new agreement after an earlier collective agreement had expired, thus implying that an agreement signed after voluntary recognition when there are no employees in the unit may not be a collective agreement. The Board notes that section 121 of the Act merely deems an agreement in writing to be a collective agreement under certain circumstances; it does not provide that an agreement signed when there are no employees in the unit is not a collective agreement. (See section 48 of the Act for a specific provision deeming an agreement not to be a collective agreement.) Therefore, section 121 of the Act has no application to the facts of this case.

15. The Board in *C. Strauss and Voland* [OLRB File No. 0802-75-R, decision dated 17th November, 1975] held that there was no collective agreement by applying section 49 [now 48] after finding that the union had received “other support” from the employer when it signed a collective agreement without employees in the bargaining unit. We are satisfied that, in the circumstances of this case, although the agreement was signed on October 8th, 1975, when, as the parties have stipulated, “The respondent had no employees in the purported bargaining unit...”, the intervener union did not receive “other support” from the employer. To the contrary, the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in

exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not "other support" from an employer which calls for the application of section 48 of the Act.

26. The cases since *Nicholls-Radtke*, *supra* have understandably been based on similar facts. In the *M. J. Guthrie Construction* case, *supra*, the company already had employees and, like the facts in *Nicholls-Radtke*, *supra*, signed an agreement in contemplation of future work. As able and thorough as counsel for the union was in his presentation, he did not present the Board with a case where the Board had recognized a collective agreement between an employer and a trade union in the construction industry where there were no employees at the time of signing and only a hopeful anticipation of the need and ability to hire employees on future projects.

27. On the facts of this case, it is undisputed that at the time the purported collective agreement was signed, Mr. Lineham knew that Mr. Tominski and Mr. Brisson were both signing as employers and that there were no employees on the site. There is also no suggestion that any employees were about to be hired for the project and that the union would be activated in its capacity as a hiring hall to refer such employees. Instead, even if we take Mr. Lineham's evidence as completely accurate, all we have here is Mr. Brisson, and perhaps Mr. Tominski, indicating to Mr. Lineham that they intended to hire through the union if and when their business expanded and required extra help. But at the time of the signing of the document, neither Mr. Tominski nor Mr. Brisson, nor the two acting together, had any contracts for future work in which they contemplated the need to hire electrical workers. There was no immediate or realistic expectation that they would employ employees in the immediate future. Under these circumstances, it cannot be concluded that the ratio in *Nicholls-Radtke*, *supra* is applicable. In the latter case, the Board was allowing for the orderly arrangement of having the union referring its members who needed work to an employer who needed persons to perform that work. In the case at hand, the employer had no present or real future need for employees. In these circumstances, section 48 remains applicable. The parties to this case agree that section 121 has no application to the facts of the case. Therefore, the agreement signed in July of 1985 cannot be said to constitute a valid collective agreement or create valid bargaining rights for the union.

28. As a result of this conclusion, the question of whether a sale existed in the terms of section 63 or whether section 1(4) applies is really academic. But suffice it to say that there was no evidence of common direction or control between the respondents within the meaning of section 1(4) of the Act. Certainly, since the LaSalle Square project and the signing of the purported agreement in July of 1985, there has been no common activity or even a relationship between Mr. Tominski and Mr. Brisson whatsoever. We find that the facts of this case are very similar to those in *Base Electric*, *supra*, paragraph 7. Thus, section 1(4) of the Act is not applicable.

29. Alternatively, we would also have concluded that the facts do not support a finding under section 63 of the Act because of the completely separate methods that Mr. Tominski and Mr. Brisson carried on business except for the two discrete projects where they simply pooled resources for a specific purpose and clearly anticipated operating separately in the future. That is not what section 63 of the Act was designed to cover.

30. Therefore, in the end, we find that no valid collective bargaining rights were gained by the union when it had Mr. Tominski and Mr. Brisson sign a collective agreement in July 1985. Hence, it cannot be said that Mr. Tominski or R. T. Electric is bound by any of the terms of that document. While Mr. Brisson has always honoured the document and considered himself bound by it, we do not conclude that it is a valid collective agreement. Therefore, the application of the union is dismissed.

2354-86-U Domenic Gattellaro, Complainant v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 222, Respondent v. Cadbury Canada Marketing Inc., Intervener

Duty of Fair Representation - Unfair Labour Practice - Grievor complaining about manner in which employer eliminated his job - Union refusing to process grievance to arbitration - Respondent may not rely in its defence on facts asserted in argument but not addressed in evidence nor is the mere belief of a respondent that it has not violated the Act of any assistance - No breach of duty - Complaint dismissed

BEFORE: *Owen V. Gray*, Vice-Chair.

APPEARANCES: *Domenico Gattellaro* for the complainant; *Steve Nimigon* and *John Sinclair* for the respondent; *Jim Michie* for the intervener.

DECISION OF THE BOARD; June 30, 1987

1. In this proceeding, Domenic Gattellaro complains under section 89 of the *Labour Relations Act* ("the Act") that the respondent has dealt with him contrary to section 68 of the Act, which provides:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

In the complaint he filed with the Board, Mr. Gattellaro named "UAW LOCAL REPRESENTATIVES John Sinclair, Robert Peters, Tony MacTese" as respondents. At the time of the events which gave rise to this complaint, those individuals were officials of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 222 ("the local union"), the union party to the collective agreement which governed Mr. Gattellaro's employment by Cadbury Schweppes Powell Inc. ("Cadbury"), now known as Cadbury Canada Marketing Inc., at its Whitby plant at the relevant time. This complaint was understood by all concerned to be a complaint against the local union, and the title of this proceeding has been amended accordingly. The complaint was defended by an official of the Canadian Auto Workers. Although all parties to this matter seem to have proceeded on the assumption that that union or one of its locals should be treated as successor to the obligations of the respondent under the Act with respect to Cadbury employees in the bargaining unit covered by the collective agreement, that question was not raised for determination in these proceedings.

2. Mr. Gattellaro has been employed by Cadbury since September 1978. He began as a production worker. He was moved to a maintenance job in 1981. He remained in that job until May 1986. At that point, Cadbury had decided to eliminate one such position. The choice of whom to lay off was between Mr. Gattellaro and another less senior employee. Article 9.01 of the collective agreement provided:

9.01 In case of reduction of the work force or a lay-off (for a period of longer than two (2) days) the following procedure will apply:

- a) Probationary employees will be laid off first;
- b) The most junior employee will be laid off first provided those remaining

have the merit and ability to perform the work. Where merit and ability are approximately equal, the employee with the greater seniority will be entitled to the preference.

Cadbury decided that the two candidates should take a written test to determine merit and ability. Mr. Gattellaro cannot read or write English. He protested that he should not be required to take a test. Tony Maltese and Norm Bassett, two union committeemen, told him that he had to take the test and that if he had some complaint about the test he should wait until he knew the results before raising it. Mr. Gattellaro took the test with the assistance of a management person who read him the questions and recorded his answers and in some instances, Mr. Gattellaro testifies, also told him what answers to give.

3. After administering the test, Cadbury decided that the junior maintenance employee had greater merit and ability than Mr. Gattellaro. The junior employee remained in maintenance; Mr. Gattellaro was moved to a production job. At Mr. Gattellaro's request, a grievance in the following terms was filed on April 22, 1986:

VIOLATION OF COLLECTIVE AGREEMENT. WE DISPUTE THE COMPANY'S USE OF A WRITTEN TEST TO DETERMINE AN EMPLOYEE'S MERIT AND ABILITY.

After this grievance had proceeded through the grievance process, the local union decided it would not be taken to arbitration. Mr. Gattellaro was put back on maintenance work during the July 1986 plant shutdown, but was returned to production work after three weeks. On August 13, 1986, he again grieved that his seniority rights had been violated. The company answer at the first step of the grievance procedure was this:

This grievance has already been dealt with previously. Domenic is not a member of the present maintenance crew but has recently been offered work with the maintenance department as a temporary assignment. This does not entitle him to remain permanently.

At the second step, the company's answer was to the effect that Mr. Gattellaro's transfer from maintenance to production in May 1986 had not violated the collective agreement. The local union decided not to take this grievance to arbitration.

4. As I have already noted, Mr. Gattellaro does not read or write English. He testified with the assistance of an interpreter. He says it is difficult for him to express himself with the company and the union. He had difficulty expressing himself in these proceedings. As best I can make of it, his complaint rests on two propositions: that his employer has no right to require an employee to take a test to decide whether he will lose his job, and that the choice between the two maintenance employees in April or May 1986 should have been made purely on the basis of seniority. The basis for the first proposition is Mr. Gattellaro's belief that it has never been done before. The basis of the second proposition is not clear.

5. A major component of the union's behaviour about which Mr. Gattellaro complains is that John Sinclair, the local union president, told him that his grievances against the use of the test could not go ahead because Mr. Gattellaro had agreed to take the test. He understands Mr. Sinclair to have said it was a mistake to have written the test. As he only wrote the test because other union officials told him he had to do so, Mr. Gattellaro argues, either they or Mr. Sinclair must have made a mistake. He argues that this mistake cost him a job which was more desirable than the one to which he was transferred because it involved more overtime. He also wonders how he could have failed management's test when a member of management helped him answer it. Mr. Gattellaro said nothing in his testimony about having ever brought this last point to the union's attention, however, nor did he say he had asked the union to challenge the content of the test or

the way the test was conducted or management's position that the other employee had done better on the test. Mr. Gattellaro's position throughout seems to have been simply that management could not require or use a test to decide which of two employees is to be laid off out of a job.

6. The only witness for the respondent was John Sinclair, who was its president at the time it decided not to pursue the grievances in question to arbitration. He says he made that decision together with Al Peters and Tony Maltese, after asking them and Mr. Gattellaro whether they had agreed to the test. He states that they, including Mr. Gattellaro, told him that they had agreed that the test would be taken and had also agreed that the test would determine who would remain in the maintenance job. He states that they, including Mr. Gattellaro, also told him that the test had been conducted properly. In the grievance meetings, Mr. Sinclair learned that one of the qualifications for that one remaining maintenance job was the ability to read and write English, because part of the job involved oiling different plant machinery according to a schedule and making a record of that oiling. He acknowledges that the aforesaid agreements by the grievor, the plant chairman and the committeeman were the basis of his decision not to pursue the first grievance to arbitration. He notes that the union's discussions with the company did result in November 1986 in reinstatement of Mr. Gattellaro to a somewhat similar job in what was then referred to as the "factory services function".

7. Mr. Sinclair's testimony was silent about what he had said to the complainant, leaving unchallenged the evidence that he had told the complainant it was a mistake to have written the test. The complainant did not give reply testimony, so Mr. Sinclair's testimony about what the complainant told him had been agreed to was also essentially uncontradicted. Neither witness said anything about whether the complainant had told Mr. Sinclair that his agreement to take the test has been based on the advice of Al Peters and Tony Maltese that he had to take the test. Neither Al Peter's nor Tony Maltese was called to testify. In the result, the facts are far from clear.

8. In the application of the law of those facts, I have had very little assistance from the parties. The complainant was unable to articulate how the words of section 68 apply and to what particular acts or omissions. He simply feels that the local union should not have dropped his grievances. For the respondent's part, its presentation reflected two quite mistaken beliefs. One was that it could rely on its defence on facts asserted in argument but not addressed in evidence. The other was that the Board could be expected to give weight to Mr. Sinclair's predictable answers to such questions as "Do you feel the union did anything arbitrary?" That and similar questions about discrimination and bad faith are the very questions on which this Board must form an opinion in dealing with a complaint of this kind. While the factual basis for such a belief may be relevant to the extent it is supported by evidence, the mere belief of a respondent that it has not violated the Act can be of no assistance to the Board in arriving at its own conclusion on the question.

9. Section 68 of the *Labour Relations Act* does not require that a trade union carry a grievance through to arbitration merely because the grievor wants it to do so. Unless the collective agreement gives the grievor that right, it is for the union to decide whether or not to take a grievance to arbitration. Section 68 requires that the union make that decision in a manner which is not arbitrary, discriminatory or in bad faith. It does not provide an appeal to the Board from the union's decision. The question for the Board is not whether the union's decision is the one which this Board would have made in the circumstances, it is whether the union's decision is the result of a process of reasoning grounded on a consideration of relevant matters and free from the influence of irrelevant ones: see *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, 6 CLRBR (NS) 134, at paragraphs 36 to 39. The Board has recognized that considerations relevant to a decision whether or not to press a grievance to arbitration include the merits of the grievance and likelihood of its success, the financial commitment involved in proceeding to arbitration and the claims or interests

of other individuals or groups within the bargaining unit who may be affected by the arbitration proceedings and their possible results: see *Catherine Syme*, [1983] OLRB Rep. May 775 at paragraph 120.

10. On the evidence before me, I am unable to find any discrimination or bad faith in the union's representation of Mr. Gattellaro. On the question whether there has been arbitrary conduct, I find that Mr. Sinclair made his decisions on the basis of a reasonable belief that Mr. Gattellaro had agreed not only that he would take the test but also that the test results would determine whether he or the other employee would stay in maintenance. Mr. Gattellaro had not raised with him any concern about the way the test was conducted or the relevance of the test questions to the job at issue. He could and did reasonably conclude that matters of that sort were not in issue. The issues were only whether the employer could test relative merit and ability and whether it could base its decision on anything other than seniority. On the language of Article 9.02 of the collective agreement, seniority is clearly not the only factor in decisions of this kind. While there is an arguable inconsistency between the last two sentences of the article, on any view of that article merit and ability are relevant to a layoff decision. It is not and was not unreasonable to conclude that management can require candidates for jobs to submit to relevant tests of merit and ability. The union accepted an interpretation of Article 9.02 which puts the weight on the approach of the last sentence, under which seniority is only determinative if merit and ability are approximately equal. That interpretation is not unreasonable, nor was the local union's acceptance of Cadbury's view that the second grievance was merely a restatement of the first. While it seems strange that Mr. Sinclair would tell Mr. Gattellaro he had made a mistake in submitting to the test, on the totality of the evidence before me I am nevertheless not persuaded that the union acted in an arbitrary fashion in representing the complainant.

11. Accordingly, this complaint is dismissed.

0490-87-R Ontario Public School Teachers' Federation, Applicant v. The Board of Education for the City of Hamilton, Respondent v. Ontario Secondary School Teachers' Federation, Intervener

Bargaining Unit - Certification - Pre-Hearing Vote - Problems with identifying employees in the voting constituency in applications involving occasional teachers - When application of *York* test places teacher in more than one unit, teacher falls in unit to which s/he has the greatest attachment - Voting arrangements made for occasional teachers - Earlier application for certification of educational assistants to be considered with this application after vote

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *I. M. Stamp* and *J. Redshaw*.

DECISION OF THE BOARD; June 12, 1987, as amended June 24, 1987

1. This is an application for certification filed May 19, 1987, in which the applicant has requested that the Board conduct a pre-hearing representation vote.

2. The parties agree that the appropriate bargaining unit, and hence the voting constituency for the purpose of any pre-hearing representation vote, should be described as follows:

all occasional teachers employed by the respondent in its elementary panel in the City of Hamilton, save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987.

We do not determine the appropriate bargaining unit at this stage. We are prepared to and do adopt the parties' description of the voting constituency, with the clarificatory observation that "occasional teacher" in this context has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, C.129, as amended. A pre-hearing representation vote may be directed in this voting constituency under subsection 9(2) of the Act if it appears to the Board, from the records of the applicant and the records of the respondent, that not less than thirty-five percent of the employees in the voting constituency were members of the trade union at the time the application was made.

3. Because of the nature of the relationship between a school board and the persons it calls upon to act as occasional teachers from time to time, identification of "the employees in the voting constituency" at any particular point in time creates special difficulties in applications involving occasional teachers and has attracted the application of special tests: *Board of Education for the City of York*, [1985] OLRB Rep. May 767; *The Board of Education for the City of Scarborough*, [1987] OLRB Rep. Jan. 119. The applicant has challenged a number of the names on the list of persons whom the respondent says were "employees in the voting constituency" at the time of the application. The applicant has the requisite appearance of membership support only if a substantial number of the persons it has challenged were not, in fact, "employees in the voting constituency" as of the application date. In such circumstances, the Board ordinarily directs that a representation vote be conducted *and* that the ballot box be sealed and the ballots cast not counted unless and until the determination contemplated by subsection 9(4) of the Act have been made: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989.

4. Upon an examination of the records of the applicant and the respondent, assuming that the applicant's position on the matters in dispute is correct, it appears to the Board that not less than thirty-five percent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondent in the voting constituency described above.

5. All employees of the respondent in the voting constituency on June 3, 1987, who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date of the vote will be eligible to vote. Voters will be asked whether they wish to be represented by the applicant in their employment relations with the respondent.

6. An understanding of the scope of this voter eligibility direction depends on an understanding of the meaning of "employees ... in the voting constituency" in the context of an application for certification with respect to occasional teachers. In *Board of Education for the City of York, supra*, the Board decided that an occasional teacher will be treated as an employee in a voting constituency or bargaining unit of occasional teachers employed by a school board if, as at the relevant date, he or she

- (a) is on the "panel" or list which the school board maintains of those persons whom it considers eligible for and interested in occasional teaching assignments with that school board;
- (b) remains actively interested in performing such occasional teaching assignments as might arise from time to time; and

- (c) has actually worked for the school board as an occasional teacher on at least one day in the one year period immediately preceding the point in time as of which the determination is to be made.

These tests may be insufficient in the case of a teacher whose actual teaching assignments with a school board sometimes fall within and sometimes fall outside the occasional teacher unit applied for.

7. The employees of any particular employer may constitute more than one bargaining unit or potential bargaining unit for the purposes of collective bargaining. In the industrial context, for example, office and clerical employees are ordinarily regarded as forming an appropriate bargaining unit separate and distinct from the "plant" unit of employees engaged in production. There are usually several appropriate units of employees of school boards organized or capable of being organized for the purpose of collective bargaining. An employee who is a teacher (as that term is defined by *The Education Act*) and employed to teach will fall within one of the bargaining units in respect of which collective bargaining takes place under the *School Boards and Teachers Collective Negotiations Act* R.S.O. 1980, C.464 (often referred to, and referred to here, as "Bill 100") unless he or she is an occasional teacher. Collective bargaining for occasional teachers falls under the *Labour Relations Act*. In dealing with occasional teachers, this Board's approach to bargaining unit description has mirrored, to some extent at least, the bargaining unit structure created by Bill 100. Teachers employed as occasional teachers in Part XI (french speaking) schools - that is, those who act as substitutes for permanent or probationary teachers represented under Bill 100 by a branch affiliate of L'Association des Enseignants Franco-Ontariens - have been treated as a distinct bargaining unit: *Le Conseil Scolaire D'Ottawa*, [1985] OLRB Rep. July 1090. Occasional teachers on a school board's "elementary panel" - that is, those who act as substitutes for permanent and probationary teachers represented under Bill 100 by branch affiliates of The Federation of Women Teachers' Associations of Ontario or The Public School Teachers' Federation - are treated as a unit separate and distinct from occasional teachers on the school board's "secondary panel" - that is, those who act as substitutes for permanent and probationary teachers represented under Bill 100 by the Ontario Secondary School Teachers' Federation: *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273.

8. A bargaining unit comprises the employees for whom a particular trade union is to be the exclusive bargaining agent. The notion of exclusivity requires that bargaining units be so defined as to ensure that an employee falls within only one such unit at any particular point in time. Returning to the industrial example in which office and clerical employees are excluded from the unit into which plant employees fall, an employee may move back and forth between the office and the plant and so fall within the plant unit and the office unit at different times, but that employee cannot be in both units at the same time: see *Laurent Lamoureux Co. Ltd.* [1985] OLRB Rep. Nov. 1618 at paragraph 15. By way of example in the school board context, a teacher employed by a school board as a permanent teacher on a part-time basis may also take occasional teaching assignments with the same school board. While engaged in his or her duties as a part-time permanent teacher, that teacher would be governed by the collective agreement negotiated under Bill 100. While performing an occasional teacher assignment as a substitute for another permanent or probationary teacher, that teacher would fall within an occasional teacher bargaining unit and be governed by any collective agreement which might have been negotiated in respect of occasional teachers in that unit: *Carleton Roman Catholic Separate Board*, [1987] OLRB Rep. Jan. 18. If occasional teachers employed by a school board are divided into more than one bargaining unit on the basis of language or grade level of instruction, a teacher may move from unit to unit according to the nature of the occasional teaching assignments he or she performs from time to time. Just as in the industrial context mentioned earlier, that employee may be in different bargaining units at

different times, but cannot be said to be in two or more bargaining units of one employer simultaneously.

9. In circumstances in which teachers receive a variety of teaching assignments in the course of a year, the application as of a particular date of the test propounded in *City of York Board of Education, supra*, can lead to the conclusion that the employee was in two or more bargaining units simultaneously on that date. The Board had to deal with this problem in *The Board of Education for the City of Scarborough*, [1987] OLRB Rep. Jan. 119. In that decision, the Board concluded that teachers who “ordinarily” acted as substitutes for secondary school teachers but “occasionally” worked in the elementary schools in the year preceding the relevant date, should not be regarded as falling within the bargaining unit of elementary panel occasional teachers as of that date. We take this to mean that when the application of the *York* test places a particular teacher in more than one existing or potential unit of teachers, that teacher will be treated as falling within the bargaining unit to which he or she has the greatest attachment as of that time, in terms of the relative quantities of work performed during the year preceding the relevant date in each of the bargaining units of teachers employed by the subject school board.

10. Any dispute as to whether a particular teacher was employed in the voting constituency or the appropriate bargaining unit for the purpose of the count or of the vote in this case can only be determined after the vote has been conducted. Any person who claims to fall within the voting constituency we have defined will be permitted to cast a ballot. If any voter’s eligibility is challenged, his or her ballot will be segregated and not counted until the question of eligibility has been resolved. Additionally, the ballot box will be sealed and none of the ballots counted unless and until the Board is satisfied that not less than thirty-five percent of the employees in the bargaining unit ultimately found appropriate were members of the applicant at the time the application was made.

11. While the proper description of the appropriate bargaining unit will be decided by the Board after the vote is conducted and all interested persons have had the opportunity of a hearing, some comment on that issue is warranted in view of the parties’ discussions with the Labour Relations Officer in this matter as noted in his report to the Board. While the parties have agreed that the bargaining unit description should include the words “save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987” (the application date), the panel which ultimately disposes of that issue may wish to consider the propriety of including those words. It is true that, to date, such words have almost invariably been included in the description of occasional teacher bargaining units, as the Board noted in *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18 at paragraph 19:

The customary description of an occasional teacher bargaining unit expressly excludes “employees in bargaining units for which any trade union held bargaining rights as of [the application date.]” That language was originally adopted to satisfy concerns that school boards had about making distinctions between occasional teachers and teachers covered by Bill 100. Strictly speaking, this exclusionary language is unnecessary for that purpose, since “occasional teachers” are not “teachers” as that term is currently defined in Bill 100.

The Board went on in that paragraph to note that:

It is important to remember, however, that that exclusion (whether by express language or by operation of Bill 100 and subparagraph 2(f) of the *Labour Relations Act*) only applies to a teacher in respect of employment which falls within the scope of Bill 100. In respect of employment to teach as a substitute for a permanent, probationary or temporary teacher in the circumstances described in clause 1(1)31 of the *Education Act*, a teacher is an occasional teacher and falls within the customary occasional teacher bargaining unit description even if, during other

hours of the week, he or she is engaged by the same school board in employment which falls within the scope of Bill 100.

Having regard to the way in which the issues developed in that particular case, it may be that the addition of the words in question is not only unnecessary but also potentially misleading to those who may not understand the point made in the latter half of the paragraph just quoted. Because of this possibility of misunderstanding, the Board may wish to reconsider its current practice.

12. There is no suggestion that occasional teachers employed as such by the respondent fell within any bargaining unit for which a trade union held bargaining rights as of the date of this application. If any of the parties wishes the Board to include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" in the final bargaining unit description, they should include their representations in support of that request in the statement of desire they file after receiving notice of the Returning Officer's report on the conduct of the vote. If no such representations are received by the Board, it will be assumed that this request has been abandoned by the parties.

13. In accordance with the Board's current practice, the vote will be conducted by poll, but notice to employees of the taking of the vote will be given both by postings in the respondent's schools and by mail to the persons named on the voters lists prepared by the parties. The respondent shall provide the Board with two sets of mailing labels (one for the notice of taking of vote and one for the subsequent notice of Returning Officer's report) containing the names and last addresses known to the respondent of all of the person on the voters lists. The applicant may also (but is not required to) supply two sets of mailing labels with respect to any or all of the persons on the voters list. If the addresses on the applicant's and respondent's labels for any person differ, notices will be sent to both addresses.

14. There is one final matter on which we feel we must comment. At the time this application was filed there was another application for certification before the Board (Board File No. 3337-86-R) affecting employees of the respondent. No final decision had then (or has since) been made in that application. While the unit applied for in that application consisted only of full-time "educational assistants", in a decision dated April 21, 1987 the Board (differently constituted) concluded that it should consider whether any categories of unorganized employees of the respondent other than educational assistants should be included with educational assistants in the appropriate unit for that application. It directed that notice be given to all such unorganized employees that they were affected by that application as a result of the Board's expansion of its bargaining unit inquiry. The list of unorganized employees identified in the decision includes "occasional supply teachers" and "long-term occasional teachers." It might be argued, therefore, that occasional teachers were "affected by" the earlier application when this one was filed on May 19, 1987 and that this application is a "subsequent application" within the meaning of subsection 103(3) of the Act, which provides:

Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the sub-

sequent application but subject to any final decision issued by the Board on the original application; or

- (c) refuse to entertain the subsequent application.

If this is a subsequent application, the approach in subparagraph 103(3)(b) is the one which the Board would ordinarily take. That raises the question whether the "consideration" postponed under that approach is just consideration of the merits of the application or whether "consideration" is so broad as to cover processing and other procedural handling of the subsequent application, including any direction or conduct of a pre-hearing vote.

15. This issue was not identified by the Board during the initial processing of this application. It is not referred to in the Labour Relations Officer's report on his conference with the parties about the issues in this application. The issue only came to this panel's attention after receiving the officer's report on that conference. The parties have planned for a vote scheduled for June 23, 1987. There is not time to entertain, invite and consider the parties' submissions on this issue before that date. It may be that the panel dealing with that other application would not or will not regard it as affecting occasional teachers, having regard to the Board's heretofore very firm policy of treating occasional teachers within the meaning of clause 1(1)¶31 of the *Education Act* as an appropriate unit by themselves: *Windsor Roman Catholic Separate School Board*, [1986] OLRB Rep. July. 1028 at paragraph 6; *Carleton Roman Catholic Separate School Board*, *supra*, at paragraph 17. It may also be that, after a thorough consideration of the point, the Board would conclude that the direction and conduct of a pre-hearing vote do not constitute "consideration" of the sort postponed under subparagraph 103(3)(b). The first of those questions can only be addressed by the panel which deals with the earlier application; neither question can be addressed properly before June 23rd. In these rather unique circumstances, the vote should proceed. After the vote has been conducted and notice given in Form 72, this application should be listed for hearing with respect to the applicability and effect of subsection 103(3) before the panel dealing with the earlier application (Board File 3337-86-R). That other application should be scheduled for hearing by that panel at the same time, so that all parties interested in the scope of that earlier application can address that aspect of the issue.

16. The matter is referred to the Registrar.

1245-85-R The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, Applicant v. **Hemco Developments Limited**, Respondent

Certification - Construction Industry - Individuals carrying on carpentry work at housing project sent by employer to work at the respondent's shopping plaza project - Carpenters' employer acting as project manager for respondent - Whether individuals employees of respondent - Employer project manager acting as carpentry subcontractor - Board declaring that carpenters not employees of the respondent

BEFORE: *Thomas S. Kuttner*, Vice-Chair, and Board Members *W. H. Wightman* and *W. F. Ruthford*.

APPEARANCES: *David McKee* and *James E. Smith* for the applicant; *M. E. Geiger*, *Steve McArthur*, *Stan Moneta* and *Al Sant* for the respondent.

DECISION OF THE BOARD; June 11, 1987

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act* and brought by the applicant in accordance with sections 119 and 144(1) of the said Act.

2. The Board finds that Locals 27 and 1304 of the United Brotherhood of Carpenters and Joiners of America are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.

3. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.

4. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.

5. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

6. In its decision of September 23, 1985, the Board appointed a Labour Relations Officer to enquire into and report to the Board on the composition of the bargaining unit and the list of employees with respect to which the application was brought.

7. As a result of discussions with the Labour Relations Officer so appointed, the parties are agreed that the bargaining unit description should be that sought for by the applicant and normally found appropriate by the Board for the carpentry trade. Accordingly, the Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The respondent initially took exception to this application on the basis that it was not an employer in the construction industry within the meaning of section 117(c) of the Act. However, in light of its agreement with the bargaining unit description above found and its failure to argue this issue before it, the Board takes the view that this objection to the application has been abandoned. In any event, on the basis of the evidence before it the Board has no difficulty in determining that the respondent is an employer within the meaning of section 117(c) of the Act.

9. The parties are only partially agreed as to the list of persons to be considered for purposes of the count. It is agreed that T. Walsh and A. Piercy on whose behalf a membership evi-

dence was tendered in support of this application are properly included in the list as persons in the employ of the respondent engaged in carpentry work on site on the date of application. For the respondent, it was also submitted by letter dated October 3, 1985, that one R. ("Bob") Gratto whose name appears on Schedule "D" filed by the employer as an employee not at work on the date of application, ought in fact to have been listed on Schedule "A" as a person so employed and present. However, the parties have since agreed to the deletion of R. Gratto from the list of employees for the purpose of a count.

10. Left for determination, then, is the status of three individuals whose names appear on Schedule "A" filed by the respondent as among those employees in the bargaining unit described in the application of the applicant, present at work and engaged in the trade on the date of application, August 16, 1985. These are B. Geerlings, J. Gratto and T. Gapp. It was the initial position of the applicant that the three named persons were improperly so listed on three counts: none was at work on the date of application; none was performing the work of the trade; none was an employee of the respondent. In the proceedings before us, the first two of these objections were abandoned and argument limited to the third objection raised. Thus the issue joined before the Board was a limited one: whether for the purposes of the count, B. Geerlings, J. Gratto and T. Gapp, or any one of them, were employees of the respondent on the date of application. In addressing that issue, the Board notes that the parties are agreed that the evidence adduced by T. Gapp is to be representative of himself and J. Gratto save as disclosed otherwise by the time sheets of the latter.

11. Commencing in spring, 1985, the respondent was engaged in the construction of a shopping plaza located in Maple, a project whose estimated net worth was in the area of three million dollars. Included in the work was a certain amount of demolition of existing structures in order to accommodate the building and expansion of the shopping plaza. Hemco retained A.J. Sant Developments Limited, a residential builder situate in Barrie, Ontario, to perform management services at the Maple site. Al Sant, a principal of Sant Developments had undertaken to act as project manager at the Maple site. His involvement as such arose because of a family relationship with the respondent Hemco - his father is, together with Max Moneta a principal of Hemco. Sant is himself a graduate engineer who has been involved in the construction industry for the greater part of his life, working with a variety of general contractors and with his own father as a home builder and developer. The terms of the agreement between Sant Developments and the respondent called for the payment of four thousand dollars monthly for management services rendered and this is reflected in the invoices submitted in evidence.

12. In late spring, the respondent experienced some difficulty in retaining general carpenters for the work required at the Maple site. Sant Developments was itself engaged in a housing project in Midhurst and had in its employ several persons engaged in general carpentry work including B. Geerlings, a journeyman, T. Gapp and J. Gratto, the latter two being apprentices and working as carpenters assistants. Geerlings has worked on a seasonal basis for Sant Developments since 1981 and Gapp likewise since 1984. In light of the difficulty being experienced by Hemco, Sant suggested that carpenters from the Midhurst housing project be used at the Maple site. He stated in evidence:

"There were odds and ends of carpentry work that needed doing, and I attempted to get a carpentry contractor, and was unsuccessful. Max [Moneta] also tried, and I believe Mike [Delbuono, site supervisor] as well, and we then attempted to hire some carpenters locally, individuals, and, again, without much luck and I had a few carpenters on staff up in Barrie, you know, we said. In other words they were available to Hemco to use." (Examiner's report p.76 1.5 - 10)

As both Geerlings and Gapp testified, Sant approached them at the Midhurst site and suggested that they could perform carpentry work at Hemco's project in Maple. The carpenters were amenable to the suggestion. Thus, throughout the summer months, the great bulk of the time of the three carpenters was spent on the Hemco site engaged both in demolition and in general carpentry work.

13. There was some question as for whom the carpenters would be working. The evidence is inconclusive, although there was a perception on the part of both Geerlings and Gapp that they were working for Hemco inasmuch as both Max Moneta and Mike Delbuono directed their work at the site on a daily basis, particularly in the absence of Sant himself, who was not present at Maple on such a basis. However, at no time were any of the carpenters laid off by Sant Developments nor was their employment otherwise terminated. Indeed no formal application for employment was ever processed for the three individuals by Hemco, nor was a T.D. 1 Income Tax Form for Revenue Canada submitted. Further, throughout this period, both Geerlings and Gapp testified that on occasion they were assigned by Sant to work at the Midhurst housing project site which was simultaneously being carried on by Sant Developments, rather than at the Maple shopping plaza site being developed by Hemco. Throughout this time the employees were instructed by Sant to fill out their time sheets for Sant Developments in the ordinary manner i.e. indicating hours worked per project site and to submit same either to himself or to one Bob Leech at the offices of Sant Developments in Barrie. Each of the employees continued as in the past to receive a pay cheque from A. J. Sant Developments Limited for work performed whether at the Maple (Hemco) or Midhurst (Sant) site.

14. The three carpenters reside in the Barrie area. Accordingly, Sant arranged for their transportation to their Maple site from the Barrie offices of Sant Developments in a Sant Developments vehicle. In addition, Sant Developments provided the carpenters with the skilled carpentry tools required for work at the Maple site and not there available. It has been noted that managerial personnel of Hemco together with Sant supervised the work of the carpenters at the Maple site. Sant testified that in the case of two other employees supplied through Sant Developments, complaints were directed to him, as a result of which he removed each from the site and returned them to work at the Midhurst housing project.

15. Were the carpenters employed by Sant Developments or by Hemco while at this site? Sant himself responded to questions in this regard as follows:

"Q. These carpenters that were brought down, were they ever told they were going to continue as A.J. Sant employees at the site?

A. Yes in the sense that they would be reimbursed for their time down there by A.J. Sant Developments, yes.

Q. Did you tell them that they would be working for Hemco?

A. Yes in the sense that they were working on that site, yes. (Examiner's report p.77 l.10 - 20)."

The labour costs of the three carpenters was billed back to the respondent Hemco by Sant Developments. As is indicated in the representative's invoices submitted in evidence, such work was indicated as "extra to demolition contract". The demolition contract refers to the work required to demolish the existing structures on the shopping plaza site. In his testimony Sant indicated that a separate agreement had been reached between himself and Max Moneta with respect to the demolition contract which was to be undertaken by Sant Developments at cost:

Going back to the project, there is an existing plaza which we are building a new one around, and parts of the existing building have to be demolished at certain stages before you could build the new building, so initially I took on the demolition as well. (Examiner's report p.86, l.10 - 12.

And further when asked as to the significance of the notation "extra to demolition contract" and whether it was being added to that contract he stated:

"No. The demolition work was very specific. In other words, obviously what it refers to, and there was an understanding between Max and myself that we would use my forces to do that. And this extra to demolition is basically the carpentry work. It's something that we didn't plan on doing from the outset. And that's why it was structured that way."

Q. What you are saying then is that the \$4,816.50 recorded against this extra to demolition contract represents the invoice from Sant Developments to Hemco for the labour of Bert Geerlings, Tom Gapp and others?

A. And other labour, yes.

Q. Labour supplied by Sant Developments?

A. Right. Excuse me that may also include some materials as well.

16. Does the evidence support a finding of an employment relationship between Hemco and the three carpenters in question as asserted by the respondent, or of such a relationship between the three and A.J. Sant Developments Limited as argued by the applicant? The Board has in the past been faced with similar situations in which incompatible claims for the existence of an employment relationship have been urged. In *Thunderhawk Developments*, [1983] OLRB Rep. Aug. 1378, the Board articulated the principles governing where such a determination is required as follows:

Whenever the Board has the task of determining which of two or more companies is the employer of a group of employees for purposes of the Act, it must look beyond the form and appearance of the relationships involved to their realities. The Board has adopted certain criteria to assist in this kind of determination. Those criteria and the manner in which they have been applied by the Board were extensively canvassed in the Board's decision in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538. That decision adopts seven criteria which were set out in another Board decision, *York Condominium Corporation*, [1977] OLRB Rep. October 645. They are:

(1) The party exercising direction and control over the employees performing the work. See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case [1968] OLRB Rep. Sept. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.

(2) The party bearing the burden of remuneration. See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.

(3) The Party imposing discipline. See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.

(4) The party hiring the employees. See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.

(5) The party with the authority to dismiss the employees. See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.

(6) The party which is perceived to be the employer by the employees. See the *Sentry Department Stores Limited* case, *supra*.

(7) The existence of an intention to create the relationship of employer and employees. See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

The Board in *Sutton Place*, *supra*, observed that those criteria were applied to the particular facts in *York Condominium* without being given any particular priority by the Board. Rather the Board came to a decision on the preponderance of evidence. The same approach was followed by the Board in *Sutton Place* to sort out the intricate corporate relationships and to decide which of several corporate entities was the employer. In contrast to *Sutton Place*, the instant case is simple and straightforward. Consequently, the task of applying the criteria to the facts is a considerably simpler and more straightforward one.

17. As there, so here the Board is of the view that the task of applying the accepted criteria to the facts presented is a straightforward and simple one. First it cannot be over emphasized that here, in contradistinction to the cases noted, an ongoing and long standing employment relationship between A.J. Sant Developments Limited and the three carpenters in question is admitted. That relationship predated the work on the respondent's Maple project, coexisted simultaneously with the ongoing work on that project and persisted subsequent to the departure by the carpenters in question from that project. Thus, if the respondent is correct in asserting that while engaged at its shopping plaza project at Maple the individuals in question were employees of it and of none other (and in this regard it is of note that the parties are agreed that the provisions of section 1(4) of the Act are not here engaged) then the finding to be made must be one of an intermittent employment relationship between the three carpenters and the respondent on the one hand i.e. while these were engaged at Maple, and by the three carpenters and Sant Developments on the other while engaged at its projects at Midhurst and elsewhere. But such a finding flies in the face of common sense and common practice in the construction industry.

18. It may well be that Al Sant himself might at any one time act as owner, developer, contractor and project manager - but such a multiplicity of function does not necessarily convert employees of Al Sant Developments Limited into employees of the main businesses with which Al Sant wishes to associate in one capacity or another. These are tradesmen who ply their trade as skilled workmen at those sites at which their employer, a developer principally engaged in the residential sector of the construction industry, is active. Here the employer is active at a site in the ICI sector, principally providing the services of a project manager, but on request those as well of a carpentry subcontractor. It does not do to parse the facts here present and strain to interpret them in such a manner as that, when measured against the seven-fold test traditionally applied, they reveal an employment relationship between the three carpenters and the respondent.

19. Thus, counsel for the respondent made much of the exercise of direction and control over the carpenters by Max Moneta and Mike Delbuono. But their authority was clearly a delegated one subordinate to that of Sant - and of that delegation the employees were advised. Never was discipline imposed by anyone associated by Hemco. Rather, as is common for any owner, complaints were directed to the employer of the unsatisfactory employees - A.J. Sant Developments Limited. There was never any question of Hemco hiring these carpenters, determining a wage rate or remunerating them for services rendered. That was all times a function of A.J. Sant Developments Limited. There was on the part of neither Hemco nor the employees an intention to create a relationship of an employer and employee and any perception on the part of the employees to the contrary was one misconceived and rooted in the rather garbled information transmitted to them by Sant when he first approached them to work on the project. It is to be recalled, that these were carpenters traditionally engaged in the residential housing sector for whom work in the ICI sector was an anomaly. Throughout this time period only A.J. Sant Developments Limited exercised the authority to dismiss employees so supplied to the respondent. That Hemco bore the burden of remuneration for the labour provided reflects nothing other than that the carpentry

work was performed, as were all services supplied by A.J. Sant Developments Limited on a cost basis. Certainly that burden does not create the relationship of employer and employee.

20. Any lingering doubts which may remain as to the existence of such an employment relationship are dispelled by the clear existence of such a relationship as between the respondent and the two other carpenters included on the list - T. Walsh and A. Piercey. These were hired following upon an inquiry made to the offices of the applicant to provide carpenters to Hemco at its Maple site. The two were placed on the Hemco payroll and received their remuneration directly from the respondent. Theirs was a hiring typical within the industry - the supply of labour by a trade union through its hiring hall to an employer requiring the services of a skilled tradesman. Once those services were rendered the relationship was terminated. Very different was the case of Geerlings, Gratto and Gapp all of whom, at the direction of their employer, A.J. Sant Developments Limited carried on carpentry work at the respondent's shopping plaza project in Maple for such time as was required and until directed to report elsewhere and to other projects at which their employer was engaged.

21. Accordingly, and in view of the foregoing, the Board declares that neither B. Geerlings, J. Gratto nor T. Gapp were employees of the respondent, Hemco Developments Limited on the date of application, or at any time.

22. On the basis of the materials before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the *Labour Relations Act*, are deemed to be members of the applicant on August 27, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. In accordance with the provisions of section 144(2) of the Act a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 5 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. And further, in accordance with the same provisions of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2871-86-R Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, Applicant, v. John Katsuras, c.o.b. as **Krush**, Respondent

Sale of a Business - Transfer of drinking establishment and liquor licence - Sale of a business although transfer not a direct one and establishment closed for several months - Change in ambiance and clientele not a substantial change in the nature of the business that continued representation by the union would be inappropriate - Respondent declared to be successor employer

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

APPEARANCES: *Beth Symes*, *James Jackson* and *Joe Leithwood* for the applicant; *R. E. Feige* for the respondent.

DECISION OF THE BOARD; June 8, 1987

1. This is an application for a declaration that the respondent is a successor employer as a result of a sale of a business within the meaning of section 63 of the *Labour Relations Act*. The respondent alleges that no sale of a business has occurred, and in the alternative, that there has been such a substantial change in the character of the business that the applicant's bargaining rights should be terminated. In any event, the respondent also contends that there was no collective agreement binding on its predecessor and thus no collective agreement to which it is now bound.

2. The respondent owns and operates a drinking establishment at 666 Kingston Road in Toronto which goes by the name of Krush and in which ten people are employed. The evidence establishes that these premises have seen a number of different owners since 1953, when the applicant was first certified as the bargaining agent for certain groups of employees. More recently, M. & M. Edwards Equities Inc. (hereinafter referred to as "Edwards") purchased the tavern in 1982 and operated it until March of 1986, when financial difficulties resulted in the mortgagee Paramount Investments Limited (hereinafter referred to as "Paramount") entering into possession of the premises and shutting down the tavern. On May 1st, 1986, Paramount entered into an agreement of purchase and sale with John Katsuras, the respondent in this matter, in which he agreed to purchase the premises and chattels on the premises. The agreement of purchase and sale also contained the following provision with respect to the liquor licence for the property:

The Vendor agrees that the Purchaser shall be entitled, at any time before closing, to make, at his own expense, all applications and take such steps as are required by the Liquor Licence Board of Ontario for the issuance of a Liquor Licence to the Purchaser for the subject premises. The Vendor agrees to co-operate with the Purchaser in this regard.

3. Mr. Katsuras and his real estate agent drafted the agreement, and after it was signed, he took it to his lawyer who advised him to amend the agreement by adding the following sentence:

The Vendor undertakes forthwith upon acceptance of this offer to apply for a transfer of the lounge liquor licence as mortgagee in possession and to assist the purchaser in its own application to follow.

4. The amendment was accepted by Paramount on May 2nd, 1986. Subsequently, Paramount applied to the Liquor Licence Board for a transfer of the lounge licence held by Edwards to itself, and a lounge licence identical to that issued to Edwards was issued to Paramount on May 21, 1986.

5. The sale transaction closed on July 14, 1986, and Mr. Katsuras applied for a transfer of the liquor licence held by Paramount to himself within the next three days. Major renovations were then carried out and the bar, formerly named "The Benny" was reopened as "Krush" in November of 1986 with new employees. No former employees were retained or rehired.

6. Turning first to the question of whether a "sale" of a business has occurred within the meaning of section 63(1)(b), the applicant argues that either two sales have occurred, that is, from Edwards to Paramount, and from Paramount to Mr. Katsuras, or that the chain of events reveals a sale from Edwards to Paramount with the interposition of a third party. The respondent alleges that this series of events does not constitute a "sale" because of the unique features of a conveyance pursuant to a power of sale, and because the transfer was not a direct one from Edwards to Mr. Katsuras.

7. The Board has interpreted section 63 broadly, both because it is framed in broad terms and to give effect to the labour relations purpose which underlies it. That purpose was described in *Marvel Jewelry Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733 as follows:

Section 55 [now section 63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

8. In *Thorco Manufacturing Limited*, 65 CLLC ¶16,052, the Board set out its general approach to construing "sale":

According to its strict signification, the term *sells* is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section [55], however, the word *sells* had been given a wide definition which includes *lease, transfers and any other manner of disposition* of the business or part thereof. In legal parlance the word *lease* generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers to another, called the *lessee*, the exclusive possession of certain property for a period of time. The word *transfers*, however, is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word *transfers* to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the words *leases, or transfers*. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases or transfers*.

It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (see also section 10 of the *Interpretation Act* R.S.O. 160 c.191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than narrow or restrictive construction.

9. In applying such a large and liberal construction to section 63, the Board looks at the substance and effect of the transaction rather than simply its legal form. As the Board commented in *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed, (1979), 26 O.R. (2d) 420 (Div. Ct.)):

In determining whether there has been a sale or other disposition of a business within the meaning of section 55 [now section 63], the Board takes into account the totality of the transaction and places little reliance upon its outward legal form.

10. Although it is possible to characterize the events in this matter as two distinct sales, we find it more appropriate and more accurate in the circumstances of this case to consider whether the sequence of events in total constitutes a sale of a business from Edwards to Mr. Katsuras. Having reviewed the facts before us at some length, we are persuaded that the events described above fall within the ambit of section 63.

11. The fact that the transaction was not a direct one between Edwards and Mr. Katsuras does not deter us from this conclusion. There is no requirement in section 63 that the events constituting a sale be contained in a single transaction or be direct and uninterrupted as between a previous employer and the ultimate purchaser. The Board has noted previously that the determination of a sale is not dependent upon whether there is an intermediary (see *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 and *Vivace Tavern Inc.*, [1982] OLRB Rep. Aug. 1224). Neither do we find the respondent's emphasis on the form of the sale to be of assistance. The Board has previously found a sale to have occurred both upon an entry into possession by a mortgagee and where a sale has been effected through a mortgagee in possession (see *Bancorp Capital Limited*, unreported, Board File 2080-79-R, March 17, 1980, *Cabbagetown Inn Limited*, unreported, Board File 2780-80-R, May 1, 1981, and *Blondies Entertainment Limited*, unreported, Board File 2073-83-R, January 31, 1984).

12. In *Cabbagetown Inn*, *supra*, the Board addressed a similar situation in the following terms:

14. We are of the opinion that the transaction between Rapaport and Rubenstein, the second mortgagees in possession, and the respondent constituted a "sale" by Muckles. The Board has previously found that the interposition of a third party, acting as an agent or conduit is irrelevant so long as a transfer takes place. (See *Marvel Jewelry Ltd.*, [1975] OLRB Sept. 733.) In the instant case, the mortgagees in possession took steps to ensure that there was no lapse of the liquor license on their entering into possession.

13. The Board has also drawn a distinction between commercial law and the broad terms of Section 63 as the following passage from *Vivace Tavern*, *supra*, reflects:

12. While counsel for the respondent was careful to trace the conveyancing of the real property from Korn Hotels (Queensway) Limited through to the respondent to the exclusion of any part by Mitsiou and while this may be an accurate interpretation of the evidence from the standpoint of commercial law, it ignores at least one significant fact in terms of section 63. It was the respondent's own evidence that Mitsiou acquired an interest in the real property in November 1979 in partnership with a numbered Ontario company and in August 1981 acquired that partner's interest. The evidence is unequivocal that Mitsiou was at that time the sole owner of the real property, but subject to the power of sale held by Birenbaum and Steinberg pursuant to the charge which they acquired from Goldberg in November 1979. The parties are agreed that Mitsiou defaulted on its mortgage and it is common ground that, as a result of its default, Birenbaum and Steinberg were exercising their power of sale when they sold the real property to the respondent. Thus Mitsiou's interest in the property was conveyed to the respondent by the exercise of that power of sale. The inter-position of a third party in such a transaction previously has been found by the Board not to be relevant as long as a transfer takes place. (*Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733). Thus the Board is satisfied that the transfer to the respon-

dent from Birenbaum and Steinberg of the real property, together with whatever interest they had in the chattels and fixtures, constitutes a sale by Mitsiou to the respondent and the Board so finds.

Having regard to the ultimate effect of the series of events before us and the manner in which the Board has interpreted and applied section 63, we conclude that a sale within the meaning of section 63 has occurred.

14. However, counsel for the respondent argued that it was not a sale of a business, but rather simply a real estate transaction. In response, counsel for the applicant pointed to the fact that a number of chattels were purchased with the premises, and emphasized the significance of the transfer of the liquor licence in this particular industry.

15. In *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, the Board posited this test for the continuation of a business:

The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction.

16. In this case, it can fairly be said that Edwards operated a bar and that Mr. Katsuras operates a bar; although they are bars with different themes and decor, the essence of the business in which employees provide for the sale of alcohol beverages to patrons is unchanged.

17. Moreover, the most critical elements of the business in this case were the premises and the liquor licence, both of which passed to Mr. Katsuras either directly or indirectly as a result of the sale. Mr. Katsuras suggested that the licence was unimportant to him since he could simply have applied for a new licence. However, he conceded that transferring the licence previously issued for the same location was faster, and it is apparent from the sequence of events, including the amendment to the purchase and sale agreement and the dispatch with which he applied for the liquor licence transfer after the sale closing, that the licence played a significant role in the transaction.

18. Mr. Katsuras also conceded that he bought the premises for the purpose of operating a drinking establishment and that he could not do so without a licence. We note that subsequent events demonstrated that it was not just a liquor licence that was of value to Mr. Katsuras, but the particular licence he obtained as a result of the sale. When Mr. Katsuras applied for the transfer of the licence, the Liquor Licence Board issued a licence which was somewhat different than that previously issued to either Edwards or Paramount in that there were restrictions on the hours that Krush could operate. The Board's decision was appealed to the Divisional Court, and counsel for the respondent conceded that Mr. Katsuras had been successful in convincing the Court that the terms of the licence could not be changed precisely because it was a transfer of an existing licence rather than a new licence. As a result of the Divisional Court decision, Mr. Katsuras was issued a licence which was identical to that issued to Edwards and Paramount.

19. The respondent also argued that no sale of a business took place because the bar had been closed for several weeks before the agreement of purchase and sale was signed, and several months before it was reopened as Krush. In these circumstances, we are drawn to the reasoning in *Hughes Boat Works Incorporated*, *supra*, in which the Board addressed a similar argument:

The respondent, as already noted, also took the position that in this case there was no continuum and that the business was not sold as a going concern since it had been closed down for approximately five months. It is to be observed, however, that in the *Culverhouse Foods Limited* case (*supra*), the Board stated:

In each case, the *decisive* question is whether or not there is a continuation of the business. The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction. (emphasis added)

In other words, what is referred to as a continuation of the business has reference not to a continuum in time, but in the nature of the business.

[emphasis added]

20. We are reinforced in our view that these comments apply to the present situation by two very similar cases in the same industry where shutdowns of eight and seven months respectively did not deter the Board from finding a continuation of the business (see *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838 and *The Last Resort Hotel Inc.*, [1984] OLRB Rep. Dec. 1700). Similarly, the fact that a purchaser may have bought a deteriorating business does not in itself mean that what was purchased was not a business. We conclude then that a sale of a business within the meaning of section 63 has occurred.

21. The respondent, however, asks us to terminate the bargaining rights of the union pursuant to section 63(5) on the grounds that there has been such a change in character in the business that it is substantially different from the predecessor business.

22. In this regard, counsel for the respondent pointed to evidence that these premises had for some years previously been considered a "biker hangout". Shortly after Edwards purchased the business, the biker clientele was made to feel unwelcome and the emphasis shifted to disco music with a generally younger, although somewhat mixed, group of patrons. Music was provided by a disc jockey or on occasion towards the end of Edwards' tenure, live bands.

23. With the coming of Mr. Katsuras, the decor of the bar has changed to reflect what was described as a "booze can" ambiance. In this regard, there is no sign announcing the presence of the bar, the windows are boarded up and customers enter through a side door off an alley. The premises are furnished in what was best described as a "tacky sixties" motif, featuring recreation room furniture of that era. Mr. Katsuras testified that Krush is now designed to appeal to a clientele whom he described as "goths", that is, people who dress primarily in black, wear eyeliner and earrings, favour dyed hair and brush cuts, and cultivate artistic pursuits. David Prentice, a disc jockey employed at Krush who identified himself as a goth, testified that the music now played could be loosely characterized as new wave.

24. The new employees hired by Mr. Katsuras either affect a goth style themselves or are colourful in other respects. Part of their job is to mingle, drink and dance with patrons, and bonuses are provided for those who take their shirts off while dancing. There is some interchange in the jobs performed and Mr. Katsuras testified that he expects all employees to perform all jobs, including set-up, tending bar, waiting on patrons, and clean-up. He hires employees casually, and if they do not work out to his satisfaction, they leave or are discharged within a few weeks. It is on the basis of this evidence that counsel for the respondent argues that there has been such a substantial change in the nature of the business that continued representation by the trade union would be inappropriate or unreasonable.

25. The Board set out its approach to section 63(5) in *Winco-Steak 'N Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788 as follows:

The implementation of subsection 5 of section 55 [now section 63] involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 [now section 63] of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow

of the general intent of the section, the Board takes the view that the words "substantially different" must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.

26. While there is no question that there have been considerable changes in the ambiance and clientele of this establishment, the Board has made it abundantly clear that changes of this nature are not those contemplated by section 63(5) so as to attract the relief set out therein. As the Board said in the *Horseshoe Tavern*, [1981] OLRB Rep. Sept. 1237:

It is now clear from the Board's jurisprudence that a mere change in decor and entertainment such as occurred here is not a "change in the character of the business" within the meaning of section 55(5) [now section 63(5)] of the *Labour Relations Act*.

27. Indeed, while we accept that there have been some minor changes in the work performed by employees, the basic work requirements and skills are essentially the same; that is, waiting on tables, tending bar, collecting money from patrons, creating a convivial atmosphere, and so forth. We are not persuaded that the changes in decor and ambiance represent fundamental differences affecting the nature of work and skills performed to the extent that continued representation by the union would be inadequate, inappropriate or unreasonable. As the Board noted in *The Last Resort Hotel Inc.*, *supra*, themes may come and go without extinguishing the bargaining rights:

With respect to the entertainment and decor of a particular establishment, experience with the industry has shown that "themes" may come and "themes" may go (as in fact has already occurred once within the short period that the present facility has been operated by the respondent), but so long as a transaction has taken place involving the assets (and in particular the licence) essential to carrying on the business of a tavern, the Board will find a "sale". The fact that the present premises have been upgraded is not disputed by the applicant, but neither that, nor the introduction of varying forms of entertainment to attract patronage, can be said to produce a substantial change in the essential character of the business, to the point of rendering the continued representation of the Tavern's employees by the applicant in any way inappropriate.

28. We are reinforced in our views in this regard by the fact that the applicant's bargaining rights have already survived a number of metamorphoses in the character of this establishment and by the Board's jurisprudence specifically dealing with this industry. (See in this regard, *The Last Resort Hotel Inc.*, *supra*, *The Horseshoe Tavern*, *supra*, *Vivace Tavern Inc.*, *supra*, *Colonial Tavern*, *supra*, *Jimmy's II*, [1977] OLRB Rep. Sept. 572 and *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838.) While we recognize that a declaration of successor rights may mean some changes as the respondent adjusts operations to conform to a collective bargaining regime, we do not find that this fact leads us to the conclusion that the continued representation by the union would be inappropriate or unreasonable.

29. Finally, the Board heard uncontradicted evidence with respect to the existence of a collective agreement dated January 11, 1985 which was binding upon the applicant and Edwards. That collective agreement specifically sets out the terms under which it would cease to operate, and those terms have not been triggered with respect to this particular establishment. Indeed, the continuing validity of the collective agreement in itself was not seriously contested by the respondent. The Board therefore declares that the respondent is a successor employer to Edwards and that it is bound by the collective agreement dated January 11, 1985 as if it had been a party thereto.

0296-87-R Energy and Chemical Workers Union, Applicant v. MIS (Canada) Holdings Ltd., Respondent v. Group of Employees, Objectors

Certification - Constitutional Law - Respondent in business of preparing its customers' materials for mailing in accordance with Canada Post requirements by labelling, pre-sorting and bundling the materials - Whether respondent's labour relations under federal jurisdiction by virtue of section 91(5) of the *Constitution Act* which assigns exclusive jurisdiction over postal service to the federal government - Board finding respondent to be a customer of Canada Post's services and not a performer of those services - Labour relations of respondent not within federal jurisdiction - Certificate issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. Montague*.

APPEARANCES: *Daniel Ublansky* and *Bryan Van Rassel* for the applicant; *Leon Paroian*, *James Renaud* and *Michael J. Dufraine* for the respondent; *Paul L. Mullins* for the objectors.

DECISION OF THE BOARD; June 19, 1987

1. This is an application under the *Labour Relations Act* R.S.O. 1980 c. 228, as amended ("the Act"), in which the applicant, a trade union within the meaning of clause 1(1)(p) of the Act, seeks certification as exclusive bargaining agent for certain employees of "MIS (Canada) Ltd." in Windsor, Ontario. The respondent's reply to the application indicates that its correct name is MIS (Canada) Holdings Ltd., and the title of this proceeding has been amended accordingly. The respondent will be referred to hereafter as "MIS".

The Jurisdictional Issue

2. MIS says its labour relations are not subject to the jurisdiction of this Board because they fall under federal jurisdiction by virtue of subsection 91(5) of the *Constitution Act*, 1867, which assigns exclusive jurisdiction over "Postal Service" to the parliament of Canada. The facts which the parties consider necessary to an assessment of this claim are not in dispute.

3. Postal service in Canada is provided by a Crown Corporation: Canada Post. Jurisdiction over its undertaking, including its labour relations, is undoubtedly federal. A customer who wishes to send a number of items by mail need only deliver them, properly addressed, to any post office or post box. Canada Post then sorts the items according to the location of the appropriate post office near the destination address and the postal code which pertains to that address. The items are then transported to the appropriate post offices for distribution by mail carriers. Items received at the destination post office are further sorted in accordance with the routes travelled by the individual mail carriers who deliver items of mail to their ultimate destinations.

4. Second, third and fourth class mail service is available for various kinds of printed matter and products including magazines and advertising materials. A customer wishing to have a large quantity of such items delivered by Canada Post will be charged a lower rate per item if the items have been properly labelled, pre-sorted (according to destination post office and mail carrier route) and bundled or bagged in accordance with Canada Post requirements.

5. MIS is in the business of preparing its customers' materials for mailing in accordance with Canada Post requirements. Ninety-five percent of its customers are U.S. based. Customer material from the U.S. is picked up at Canada Customs by MIS, which pays (and bills its customer for) any customs duties payable on the material. The customer's materials - multiple copies of

advertising programs, products or magazines - arrive at MIS in "raw" form. In some cases, MIS then inserts the items in envelopes which it addresses. In other cases, addressing of items is done on their face without insertion into envelopes. In either event, the item or envelope is stamped with an "indicia number" unique to MIS, which enables Canada Post to verify the charges payable by MIS with respect to the mailing of the items. MIS then sorts the items into bags obtained from Canada Post and labels the bags in accordance with Canada Post requirements. These bags are then placed in containers obtained from Canada Post, which are also labelled in accordance with Canada Post requirements. Canada Post trucks pick up these containers at the premises of MIS at a loading dock built to Canada Post's specifications. Canada Post monitors mail received from MIS to assess the degree of compliance with its regulations and requirements and to determine the amounts payable by MIS for the use of the postal service. From time to time, MIS employees attend training programmes established and carried on by Canada Post.

6. Including its executive, office and maintenance employees as well as employees engaged in the actual preparation of mail for mailing, MIS employs about fifty people in this operation. In 1986, MIS prepared 40 million pieces of material for mailing throughout Canada (and to some foreign destinations). Of the \$12 million in revenues earned by Canada Post at Windsor in 1984-85, \$6.5 million came from MIS. Seventy-five percent or more of the gross revenue received by MIS is paid to Canada Post for postage.

7. MIS acknowledges that the information and material it receives from Canada Post is information and material which could be obtained from Canada Post by any of its customers. The special rates paid by MIS are rates available to any customer whose mailing consists of more than the minimum number of pieces and who is prepared to and does do the required pre-sorting, bagging and labelling.

8. Counsel for the respondent argues that employees of MIS are in the same position as the employees whose labour relations were found to fall within federal jurisdiction in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178 ("the *Letter Carriers'* case"). Counsel observes that subsection 91(5) of the *Constitution Act*, 1867, speaks of "Postal Service", not "The Postal Service." Employing a metaphorical allusion to the truck haulage involved in the *Letter Carriers'* case, counsel submits that if the "drayage" of mail is "Postal Service", then the sorting and filling of bags with mail is "Postal Service" within the meaning of subsection 91(5) of the *Constitution Act*, 1867. He argues that the operations of MIS are part of the postal service of Canada Post because the sorting and bagging of mail done by MIS would otherwise have been done by Canada Post and is paid for out of revenues which would otherwise have been revenues of Canada Post. In answer to the observation that the functions performed by MIS employees are functions which could be performed by employees of customers of Canada Post, counsel argues that the labour relations between customers of Canada Post and such of their employees as might be engaged in the sorting and bagging of mail would also fall within the federal jurisdiction by reason of subsection 91(5) of the *Constitution Act*, 1867.

9. Counsel for the applicant argues that the *Letter Carriers'* case is distinguishable from this one because the employees involved there were performing part of Canada Post's functions in the postal service under the supervision of Canada Post pursuant to the terms of a contract between Canada Post and their immediate employer which made their immediate employer the agent of Canada Post for the picking up and delivery of mail. Here, counsel observes, there is no contract between Canada Post and MIS whereby MIS acts as agent for Canada Post in the provision of mail service. It is not enough, he argues, to say that the work performed by employees of MIS is analogous to work performed by employees engaged in the work of Canada Post. In that regard, he submits that the position of MIS is analogous to that of the various agents and brokers dealt with in

such cases as *Kuehne & Nagel International Ltd.*, [1979] 1 Can. LRBR 156; *Otter Freightways Limited*, [1975] OLRB Rep. Jan. 1; *Airgo Agency Ltd.*, [1982] OLRB Rep. Sept., 1233 and *Re Cannet Freight Cartage Ltd.*, and *Teamsters Local 419* (1975), 60 D.L.R. (3d) 473 (F.C.A.).

10. The basic principles governing constitutional jurisdiction over labour relations were summarized by Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Commission et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754 at pages 652-653 D.L.R., 768-769 S.C.R.:

...Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *Reference re Industrial Relations and Disputes Investigations Act, etc.*, [1955] 3 D.L.R. 721 [1955] S.C.R. 529 (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one: *Reference Minimum Wage Act of Saskatchewan to an employee of Revenue Post Office*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248 (the "*Revenue Post Office* case"); *Commission de Salaire Minimum v. The Bell Telephone Co. of Canada*, (1966), 59 D.L.R. (2d) 145, [1966] S.C.R. 767 (the "*Bell Telephone Minimum Wage* case"); *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452 (the "*Letter Carriers'* case"). The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in *Canada Labour Relations Board, et al. v. City of Yellowknife*, (1977), 76 D.L.R. (3d) 85 at pp.89-90, [1977] 2 S.C.R. 729 at p. 736, 14 N.R. 72. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", (Martland, J. in the *Bell Telephone Minimum Wage* case at pp. 148-9 D.L.R., p. 772) S.C.R. without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity: *Agence Maritime Inc. v. Canada Labour Relations Board et al.* (1969), 12 D.L.R. (3d) 722, [1969] S.C.R. 851 (the "*Agence Maritime* case"); the *Letter Carriers'* case.

Parliament's authority over "postal service" is broad enough to exclude provincial jurisdiction over employment and labour relations of Crown employees employed in the public post office: *In the matter of a Reference as to the application of the Minimum Wage Act of Saskatchewan to an employee of the Revenue Post Office*, [1948] 3 D.L.R. 801, [1948] S.C.R. 248.

11. The issue in the *Letter Carriers'* case was whether the Saskatchewan Labour Relations Board had jurisdiction to certify a trade union as collective bargaining representative of a unit of truck drivers employed by M & B Enterprises Ltd. ("M & B"). M & B had seven contracts with the Post Office for delivery and collection of mail. Six of those contracts involved delivery of bags of mail between post offices along a highway route. The other contract covered delivery of mail within the City of Regina. This involved delivery of bags of mail to urban relay boxes, delivery to addressees of special delivery mail, registered letters, parcels and C.O.D.'s (including collection of amounts due on the latter) and pick up of mail from the red letter boxes. All drivers employed by M & B to perform work under these contracts had to be acceptable to Post Office officials; each also had to be fingerprinted and take an oath prescribed by the Post Office. The Post Office gave each driver keys to Post Office facilities, an identification card which he was required to carry at all times and a pamphlet of instructions with respect to his duties as a "carrier." The Supreme Court described the constitutional issue this way:

...it has been established that it is not within the competency of a provincial Legislature to legislate concerning industrial relations of persons employed in a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. There can be no doubt that the subject-matter of the postal service is expressly assigned to the exclusive legislative authority of Parliament under s. 91(5) of the *British North America Act*, 1867 (U.K.), c. 3, and that employer and employee relations in that service are correspondingly within that authority. If authority were needed for this latter proposition, it is to be found in *Reference re Minimum Wage Act of Saskatchewan*, [1948] 3 D.L.R. 801, 91 C.C.C. 366, [1948] S.C.R. 248, particularly *per* Rinfret, C.J., at pp. 803-4.

In any event, it was common ground between the parties in the present case in this Court and in the Court of Appeal that s. 108(1) of the *Canada Labour Code* was validly enacted by Parliament and that the postal service is a "federal work, undertaking or business" within the meaning of this section, and it follows, in my view, that *if the truck drivers employed by M & B Enterprises Ltd. were found to be employees who are employed upon or in connection with the operation of the Post Office, the Saskatchewan Labour Relations Board would be without jurisdiction to entertain the application for certification.*

[emphasis added]

The Supreme Court found (at p. 109 DLR) that the work performed by the employees of M & B "... is essential to the function of the postal service and is carried out under the supervision and control of the Post Office authorities" and (at p. 111) that "the work of drivers of M & B Enterprises Ltd. as performed under its contract with the Post Office was an integral part of the effective operation of the Post Office ...".

12. Counsel for MIS also relied on the decision of the Supreme Court of Canada in the *Stevedoring* case, [1955] S.C.R. 529. There the question was whether federal labour relations legislation applied to stevedores supplied by Eastern Canada Stevedoring Co. Ltd. to load and unload ships pursuant to contracts between that company and the operators of the ships. The judgments of various members of the court noted that, even when performed by a land based crew of stevedores, by mercantile custom the loading and unloading of a ship was regarded as the responsibility of the shipowner or charterer, rather than of the cargo owner, and was carried on under the direction of the ship's Master. The stevedores in question performed their work under the direct supervision of ship's officers using ship's equipment, and their work was paid for by the shipowners or charterers. Most members of the court found that the work of stevedores was an "integral" or "essential" part of the operation of a shipping line and that the regulation of employment of stevedores was thus an essential part of jurisdiction over "Navigation and Shipping", a federal head of power.

13. In *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, the Supreme Court of Canada made this observation about the method of analysis necessary in determining constitutional jurisdiction in labour matters:

A recent decision of the British Columbia Labour Relations Board, *Re Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 20, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In both the *Letter Carriers'* case and the *Stevedoring* case, the work performed by the employees in question was work performed for the benefit of the core federal undertaking at its request and under its supervision pursuant to a contract between it and the direct employer of those employees. The existence and terms of such contracts were important characteristics of the relationship between the core federal undertaking and the operation in which the employees were engaged, and in both cases the court found that relationship "vital", "essential" or "integral."

14. The core federal undertaking in this case is the postal service operated by Canada Post. MIS is a user of Canada Post's services, not a performer of those services. It is a customer of Canada Post, albeit a very large and very sophisticated customer. Functionally, it is interposed between Canada Post's postal service and its customers, who might otherwise have been direct customers of Canada Post. It performs work for the benefit of those customers pursuant to contracts with those customers. It is, in effect, a mail service broker.

15. The relationship between Canada Post and MIS is analogous to that between a federally regulated carrier and a freight forwarder who solicits freight from customers and arranges with the carrier for the delivery of freight in volume. In *Re Cannet Freight Cartage Ltd., and Teamsters Local 419, supra*, the employees of such a freight forwarder worked in premises leased from the Canadian National Railway ("CN"), where they loaded the freight collected by their employer into freight cars provided by CN. The Federal Court of Appeal rejected the argument that this brought those employees within the ambit of the Canada Labour Code:

In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed "upon or in connection with" the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament's powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man's purely local operation, requires that he perform a large part or all of his services physically on the railway's right of way or rolling stock.

For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employee of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or in connection with their employer's business and would not *pro tem* become railway workers.

When the problem in this case is so approached, in my view, it is clear that the employees in question were not employed upon or in connection with the Canadian National Railway. They were employees of the applicant loading freight on a railway car under arrangements whereby the car was to be loaded by the shipper and not by railway employees.

The Ontario Divisional Court came to the same conclusion about a similar freight forwarding business in *Re The Queen and Cottrell Forwarding Co. Ltd.*, (1981), 33 O.R. (2d) 486, in which the court said, referring to the decision in *Cannet*:

... While the decision of the Federal Court of Appeal is not binding upon this Court it is certainly persuasive. In any event, I agree with the decision with certain amplifications. The railway company is the only body carrying on the interprovincial undertaking and it has the physical works as well. Clearly, if an individual customer of Cottrell wished to ship goods to the west, it could contract with the railway company to ship such goods. The mere fact that by contract Cottrell agrees with that individual customer to enter into the contract with the railway company

and become the shipper itself, does not make Cottrell anything other than a shipper. The shipment is merely part of an over-all contract and a person who has no tangible or physical property under its control to operate an undertaking cannot, by contract, make himself a person carrying on an undertaking within the meaning of s. 92(10)(a) of the *British North America Act, 1867*. Cottrell is not carrying on an undertaking or operation but is merely providing a service by contract. To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction. This would be unreasonable interpretation of the section in question.

See also *Airgo Agency Limited*, [1982] OLRB Rep. Sept. 1233 and *Otter Freightways Limited*, [1975] OLRB Rep. Jan. 1 in which this Board (differently constituted) observed, with reference to the *Letter Carriers'* case, that "had the arrangement been one of numerous customers asking the trucking firm to deliver mail to the Post Office the relationship with the Post Office would have been quite collateral or secondary."

16. Customs brokers are similarly interposed between a federal undertaking (Canada Customs) and the customers (importers) who would otherwise deal directly with that federal undertaking. In *Kuehne & Nagel International Ltd.*, [1979] 1 Can LRBR 156, the British Columbia Labour Relations Board rejected the argument that labour relations between customs brokers and their employees fell within federal jurisdiction, observing (at p. 167) that:

"...it is a mistake to assume that because a service offered by an employer relates to or is somehow connected with a branch of the Federal Government, the employment relations of that employer lose their independent constitutional value. If that were so, then an employer whose employees offer counsel or advise in relation to Federal income tax laws and, to carry the analysis to its absurd extreme, a lawyer offering advice and legal services to clients in relation to all manner of federal agencies and programs, would be subject in their employment relations to the Canada Labour Code. The point is that the services offered by such employers, like the services offered by a custom-house broker, are extended and provided to the public. The services are not conceived nor made available for the purpose of becoming or being an indispensable cog in the great wheel of the Federal Government; the Federal Government is quite capable of carrying on its functions in the absence of the employers and their employees who may earn a livelihood by assisting members of the public in their relations with the Government."

The British Columbia Supreme Court came to the same conclusion in *Pacific Customs Brokers Ltd., v. Office & Technical Employees' Union et al.*, [1980] 4 W.W.R. 587, in which it said:

Customs brokers in my view do not perform any function essential to the maintenance or continuance of the customs service. Undoubtedly they simplify the collector's task because they are experts in the same way as income tax consultants are experts but they are not essential. The customs service could deal directly with the public and vice versa, if the customs broker did not exist. Albeit the process would be more cumbersome for both sides.

17. It is not in any way essential or necessarily incidental to Parliament's exercise of exclusive jurisdiction over "Postal Service" that it have jurisdiction over labour relations between customers who make direct use of Canada Post's services and those of the customers' employees who handle items destined for the post office. We reject the respondent's argument that Parliament has such jurisdiction. If the term "mail" as used in counsel's argument includes mailable material destined for but not yet received by Canada Post (or perhaps some other entity operating an analogous "postal service" undertaking), then we reject the argument that the decision in the *Letter Carriers'* case stands for the broad proposition that the transportation of "mail" itself constitutes "Postal Service" and we reject counsel's elaboration thereon that the sorting and filing of bags with "mail" constitutes "Postal Service." Employees of a customer of Canada Post would not *pro tem* become postal workers while transporting, sorting or bagging "mail" for their employer. MIS does not become a "Postal Service" within the meaning of Section 91(5) of the *Constitution Act, 1867*,

nor an integral or essential part of Canada Post's "Postal Service" while preparing its customers' materials for mailing.

18. After hearing and considering the submissions of counsel, for the foregoing reasons we concluded that the labour relations between MIS and the employees for whom the applicant seeks certification do not fall within federal jurisdiction. We ruled orally at hearing that, for reasons which would later be (and have now been) delivered, this Board did have jurisdiction to and would proceed to deal with the application on its merits. Thereafter, only Mr. Renaud remained for the respondent and, apart from his filing lists of the names of persons whom the respondent claimed were employed in the bargaining unit on the application date, through Mr. Renaud the respondent declined the opportunity to participate in the hearing of the application on its merits.

The Merits of the Application

19. Counsel for the objecting employees requested that the Board extend the terminal date herein so as to permit them to rely on evidence of objection to certification filed after May 12, 1987, the terminal date originally fixed for this application. Counsel did not dispute the fact that Notices to Employees in Form 6 were posted in the workplace on May 6, 1987. Those notices informed all employees of the terminal date and of the requirement of section 73 of the Board's Rules of Procedure that evidence of objection by employees to certification of the applicant be filed on or before that terminal date. Counsel said his unavailability at the time was the only reason for the late filing. We ruled that the terminal date would not be extended for that reason and, accordingly, that the documents filed would not be entertained as evidence of objection to certification of the applicant. Apart from this limitation on the evidence which could be presented, the objecting employees remained entitled to and did (through their counsel) participate in the hearing of the application.

20. We find that the unit of employees of the respondent appropriate for collective bargaining in this application is:

all employees of the respondent at Windsor, Ontario, save and except supervisors and those above the rank of supervisor.

In this description, "supervisor" means a person who would be excluded by operation of clause 1(3)(b) of the Act by reason of his or her exercise of managerial functions. We note that this description was agreed to by the objectors, whose counsel conceded that their inclusion in or exclusion from the unit would turn on whether they are "supervisors" in the sense just described. But for its geographic scope and the substitution of "supervisor" for "manager", this is the unit described as appropriate by the respondent in its reply. The geographic scope of the unit described in the application for certification was limited to 3215 Jefferson Blvd., Windsor. No one opposed the applicant's request at hearing that the unit have municipal scope, in accordance with the Board's usual practice. The applicant's representation that the only employees in the bargaining unit on the application date were those employed at 3215 Jefferson Blvd. was uncontradicted.

21. The lists filed by the respondent name 23 persons at work in the bargaining unit on the application date and 6 not at work on that date: 4 by reason of indefinite layoff, 1 on pregnancy leave and one absent on workers' compensation. The last mentioned individual had last worked April 2, 1987 and was expected to return May 11, 1987 and was the only one of the 6 who would be regarded as an employee in the bargaining unit on the application date for the purpose of the count, having regard to the Board's "30-30" rule. In addition to the 24 persons thus identified by the respondent's lists as employees in the bargaining unit on the application date for the purpose of the count, the applicant named eight others whom it said were also employees in the unit on the

application date. With respect to two of the eight - Terry Dugdale and Wayne Jenkins - the applicant's representation that they were employed in the unit on the application date was unchallenged at hearing. The remaining six are the objectors, who challenge their inclusion in the unit as of that or any other date on the ground that they were and are "supervisors" in the sense described in the preceding paragraph.

22. Thus, there were between 26 and 32 employees in the unit on the application date, depending on whether any one or more of the objectors was a "supervisor" on that date. On the basis of membership evidence filed by the applicant, we are satisfied that 21 of the 26 persons whose employment in the unit on the application date is not in dispute were members of the applicant on May 12, 1987, the terminal date fixed for this application and the date ("the assessment date") which we determine under clause 103(2)(j) of the Act to be the time for ascertaining membership for the purposes of subsection 7(1) of the Act. No matter how many of the six objectors were employees in the bargaining unit on the application date, and even if none of them was a member of the applicant on the assessment date, it is clear that over fifty-five percent of the employees in the bargaining unit on the application date were members of the applicant on the assessment date in any event. Accordingly, it is not necessary for the disposition of this application to determine whether any or all of the objectors is a "supervisor": *Robin Hood Multifoods Limited*, [1985] OLRB Rep. July 1159. (It also follows that the objectors' statements of desire would not have affected the outcome of this application even if they had been treated as evidence of opposition by their signatories to certification of the applicant, because they were not numerically relevant: see *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138.) The status of any or all of the six objectors may be the subject of an application to the Board under subsection 106(2) of the Act by either the employer or the trade union if they are unable to resolve those questions in collective bargaining.

23. None of the parties having suggested there is any reason to exercise our discretion under subsection 7(2) to order a vote, a certificate shall issue to the applicant with respect to the bargaining unit described in paragraph 20.

0591-86-R Eugene Marks, Applicant v. United Food and Commercial Workers International Union, Local 617, Respondent

Petition - Termination - Certification application withdrawn when settlement reached that employer would voluntarily recognize the union - Termination application brought under section 60 by one of the petitioners in the certification application - Whether petition initially filed in the certification application can be raised by the applicant as relevant to whether or not the union was entitled to represent the employees in the unit at the time of voluntary recognition - Petition not relevant in this application - Application dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. H. Wightman* and *C. A. Ballentine*.

APPEARANCES: *Barry B. Fisher* for the applicant; *Bernard Fishbein* and *John Slaney* for the respondent.

DECISION OF THE BOARD; May 29, 1987

1. This is a timely application under section 60 of the *Labour Relations Act* ("the Act") for a declaration terminating the bargaining rights of the respondent trade union for a unit of employees of Jacmorr Manufacturing Limited. Subsections (1) and (3) of section 60 provide as follows:

(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

2. When this application came on for hearing, counsel furnished the Board with the following Agreed Statement of Fact, paragraph 7 of which defined a preliminary question on which the parties wished the Board to rule:

AGREED STATEMENT OF FACTS

1. The United Food and Commercial Workers' International Union ("the Union") filed an Application for Certification for the employees of Jacmorr Manufacturing Limited ("the Company") on or about October 22, 1985 (OLRB File No. 1829-85-R).
2. A number of events occurred that caused the Union to file a number of Complaints under Section 89 of the Act as well as request that the Board invoke Section 8 of the Act to certify the Union in the event that the Union's Application for Certification was not otherwise successful.
3. As a result of settlement discussions initiated by the Board, the parties agreed to have the membership evidence filed by the Union and the schedule of employees filed by the Company examined by an independent impartial person to determine whether the Union had filed sufficient membership evidence to be certified. The parties agreed Susan Ballantyne, Barrister and Solicitor, would conduct such examination. Ballantyne did so and she concluded "... that a majority of the employees in the agreed bargaining unit were members of the Union". Attached as Exhibit 1 is a copy of the Affidavit of Susan Ballantyne.
4. Following this examination by Susan Ballantyne on November 7, 1985, the Company and the Union and Gary Meinsinger and Mark Marchand, who were representatives of employees who had filed a Statement of Desire in opposition to the Union's Application for Certification ("the Petitioners"), entered into Minutes of Settlement of all outstanding matters and Board proceedings, which provided, *inter alia*:

"The Company agrees to recognize the Union as the sole and exclusive bargaining agent for all employees of the Respondent in Kitchener, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period."

and:

"The Petitioners herewith agree to withdraw their Statements of Desire filed in opposition to the Union's Application for Certification in Board File No. 1829-85-R."

The Minutes of Settlement were dated November 7, 1985. A copy of these Minutes of Settlement is attached as Exhibit 2.

5. Eugene Marks, the Applicant herein, was one of the employees involved in the circulation of the Statement of Desire and was a witness to the signing of a number of employees.
6. The parties agree that by November 7, 1985 the Union had already obtained and filed acceptable membership evidence for a majority of the employees in the bargaining unit.
7. The preliminary issue to be decided by the Ontario Labour Relations Board is whether the Statement of Desire initially filed in the Application for Certification can now be raised by Eugene Marks, the Applicant herein, as relevant to whether or not the Union was entitled to represent the employees in the bargaining unit on November 7, 1985, within the meaning of Section 60 of the Act. If the Board determines that it should consider this evidence, then the Board shall conduct its customary inquiry into the voluntariness and relevance of the Statement of Desire at another date.

The parties also agree that the notice of the certification application in Board File 1829-85-R was given to employees by postings in the workplace of notices in Form 6. Those notices told employees that the Board's hearing of the application would take place on November 8, 1985, in a Board Room on the sixth floor at 400 University Avenue, Toronto. There is no evidence of what took place there, if anything, on that day. There is no record either that a formal hearing took place or that the Registrar gave anyone notice of cancellation of that hearing. The decision granting leave to withdraw the certification application in Board File 1829-86-R is dated November 13, 1985.

3. The "Statement of Desire" referred to in the Agreed Statement of Fact consists of three pages. The top of each page bears the following handwritten notations:

Oct. 23/85

We, the undersigned employees of Jacmorr Mfg Ltd., do not wish to be represented by the United Food and Commercial Workers Union International;

Signed

Witness

A number of signatures appear below the "Signed" and "Witness" headings on each page. These documents remained in the Board's file with respect to the certification application after that application was withdrawn; they were still in the file on the terminal date in this application.

4. Counsel for the respondent argued that the "Statement of Desire" or "petition" cannot be raised by the applicant in this application. The several grounds on which he based this argument can be organized as follows:

(a) The agreed fact that a majority of employees in the bargaining unit were members of the respondent when the voluntary recognition agreement was signed is a conclusive defence to this application;

(b) A petition is irrelevant in an application of this kind

(i) because a petition can have no effect other than in the certification proceedings in which it is filed;

(ii) because a petition only "casts doubt" on membership evidence and therefore, as a union need not comply in an application of this

kind with the strict requirements which are imposed on membership evidence in a certification application, the petition cannot influence the result;

(iii) because an application under section 60 is concerned with the question of representational authority, not membership, and a petition is not evidence on the question of representation;

(c) This petition cannot be relied upon on this application

(i) because the petition was withdrawn and cannot be revived, particularly by someone whose signature as a witness appears on the document;

(ii) because the petition was withdrawn as part of a settlement which Messrs. Meinsinger and Marchand had ostensible authority to make on behalf of Mr. Marks and others;

(iii) because the question of representation raised here is the same question that was scheduled for hearing by the Board on November 8, 1986, in the certification application, and this applicant cannot complain about the way that question was resolved at that time if he did not attend at the place and time set out in the Notice given to the employees.

Before we set out our assessment of these specific arguments, we should first make some observations about certification proceedings.

5. Any employee who may be in the bargaining unit ultimately found by the Board to be appropriate is entitled to participate as a party in the hearing of a certification application and to address evidence and argument to any matter relevant to the application: *Tektron Equipment Corporation*, [1983] OLRB Rep. Nov. 1932. The exercise of that right at the time and place appointed by the Board for hearing of the application is subject to only two restrictions. The first is that if the interested employee intends to allege that any person has engaged in improper or irregular conduct, section 72 of the Board's Rules of Procedure ("the Rules") requires that he or she must file written particulars of the alleged conduct at the earliest opportunity prior to the hearing date. The second is that if the employee proposes to rely on evidence that employees in the unit oppose certification of the applicant, that evidence must comply with section 73 of the Rules. That section requires that evidence of the objection by employees to certification of a trade union be in writing and filed by the terminal date for the application. Written or documentary evidence of employee objection to certification is usually called "a petition" or "petition document(s)", even though the word "petition" almost never appears in such documents. Despite the literal meaning of this common name for such a document, its function in certification proceedings is as documentary evidence and not as either a supplication or a formal pleading.

6. If an employee wishes to rely on petition documents as evidence of the wishes of those who signed them then, in addition to the requirement that the documents be filed in a timely manner, section 73 of the Rules and the Board's jurisprudence together also require that, at the hearing of the application, evidence must be adduced of witnesses who, from personal knowledge and observation, can describe the circumstances concerning the origination of the petition and the manner in which each signature thereon was obtained. No effect will be given to the petition documents unless this evidentiary onus is discharged and the Board is satisfied, on all the evidence

before it, that the signatures on the petition are likely to represent a voluntary expression of the wishes of the objecting employees who signed it. The person who filed the petition is usually the person who presents that case, but he or she is not the only employee with standing to do so. It is important to note that the Board's rules do not stipulate that the person who actually filed a particular petition document with the Board is the only person who can seek at hearing to rely on that petition document or to introduce the evidence necessary to satisfy the evidentiary onus with respect to that document. Any objecting employee who wishes to establish that the statement in a petition reflects the wishes of the signatories is entitled to put that case to the Board provided that, in applications to which section 73 of the Rules applies, the petition has been filed by the terminal date for the application.

7. The effect given to "petitions" in certification proceedings was discussed in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138:

15. The object in certification proceedings is to determine whether a majority of employees in a unit appropriate for collective bargaining wish to be represented by the applicant trade union in their relationship with their employer.

...

The Legislature's choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent membership at and below which the appearance of majority support for trade union representation must be confirmed by a representation vote. When there is satisfactory evidence that over fifty-five per cent of the employees in the unit are members of the applicant, the Act authorizes certification without a vote. In giving the Board a discretion to order a vote even when over fifty-five per cent membership is demonstrated, the Legislature recognized the possibility that circumstances other than the number of members in the unit might, in a particular case, make trade union membership seem less reliable as a measure of an employee's desire for trade union representation.

17. If a petition is shown to be the voluntary expression of the wishes of its signatories, the effect then given to it depends on the extent to which it casts doubt on the significance of membership in the applicant as evidence of the employees' desire for representation by the applicant.

... the signature on the petition of an employee who is a union member casts doubt not on that employee's status as a member, but on the otherwise reasonable inference that the employee's membership in the trade union reflects a desire for representation by that trade union in collective bargaining with his employer. The evidence of an employee's membership, that is to say, the inference which otherwise reasonably follows from proof that the employee is a member, is "clouded" in that sense by the employee's subsequent signature on a voluntary petition. If the membership evidence which remains unclouded would not alone be sufficient to support certification without a vote, then the Board ordinarily exercises its discretion under section 7(2) by ordering a representation vote.

In short, in determining whether to exercise its discretion to grant certification without a vote, the Board considers whether the fact that over 55% of employees were then members of the applicant is a reliable indication as at the assessment date selected under clause 103(2)(j) that a majority of the employees wish to be represented by the applicant in collective bargaining. In that connection, the Board relies only on each employee's last voluntary signification of wishes as at the assessment date.

8. Turning from certification applications to applications under section 60 of the Act, the issue in section 60 applications is whether the respondent union "was entitled to represent the employees in the bargaining unit" at the time the employer recognized it as the exclusive bargain-

ing agent for those employees. Subsection 60(3) puts the onus of establishing that entitlement on the union and the employer. The Act does not expressly prescribe the circumstances in which a union which has not been certified as exclusive bargaining agent for a unit of employees can nevertheless be said to be "entitled" to represent them. It is obvious that the situations in which such an entitlement can be found are not limited to those in which bargaining rights arise by operation of subsection 1(4), section 62 or section 63, since the Act contained the equivalent of section 60 before the predecessors of those provisions were added to it. The general scheme of the Act is that a union will be entitled to represent a unit of employees in collective bargaining with their employer if a majority of employees in the unit wish to be so represented by that union. The Board has interpreted the words "entitled to represent the employees in the bargaining unit" in a manner consistent with that general scheme.

9. In *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887, the Board observed that:

10. ... on an application for termination of bargaining rights under section 60, all the parties to the collective agreement must do is establish that the union was "entitled to represent employees" at the time the collective agreement was entered into. Evidence that the trade union was entitled to represent the employees may well take a different form from the evidence of membership required on an application for certification. It must be remembered that any documentary evidence of the right of a trade union to represent employees was not necessarily prepared with a view of applying for certification and accordingly *could reflect the desire of the employees to have the union represent them without complying with the Board's stringent tests of membership.*

[emphasis added]

In *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155, the Board said:

16... the requirements of section 45a [now 60] of The Labour Relations Act, do not require membership. Section 45a speaks of representation as opposed to section 7 of the Act which refers to membership ... Accordingly, in assessing applications under section 45a the requirements of membership which obtain in applications for certification do not obtain *although membership may be some evidence of representation.*

[emphasis added]

In *Gilbarco*, the Board found that the union was entitled to represent a unit of employees because a majority of them had ratified a proposed collective agreement between it and their employer. In *York County Quality Foods Ltd.*, [1984] OLRB Rep. Sept. 1340, the Board found that the onus imposed by subsection 60(3) had been satisfied by evidence that the collective agreements under attack had been ratified at a meeting of employees called and held in such a manner that the Board concluded that the ratification reflected the will of the majority. It is clear from these cases that, for the purpose of section 60, the union's entitlement to represent employees at a particular time turns on whether at that time a majority of them wished to be represented by it in collective bargaining with their employer. The question whether or not the employees were members of the union at the relevant time (in fact or by statutory definition) is only relevant because an employee's membership (or application for membership) in a trade union is evidence of the employee's wishes with respect to representation by that trade union.

10. In *Sigal Shirt Company Limited*, [1982] OLRB Rep. Nov. 1718, the voluntary recognition attacked under section 60 was, as in this case, one of the provisions of Minutes of Settlement entered into after the union had filed unfair labour practice complaints and an application for certification under sections 7 and 8 of the Act. The applicant for termination acknowledged that a majority of employees in the unit in question had signed applications for membership in the respondent union by the time recognition was granted. No petition had been in circulation before rec-

ognition was granted, nor did the applicant initially offer any evidence which would have rebutted or clouded the otherwise reasonable inference that, as at the relevant date, those who had applied for membership in the union before that date wished to have that union represent them in collective bargaining with their employer. While acknowledging that "this amount of support would be in the normal course lead the Board to conclude that the respondent was entitled to represent the employees in the bargaining unit", the applicant nevertheless requested that the Board exercise its discretion under subsection 60(2) to hold a representation vote. It is not apparent from the Board's decision what grounds for so doing were argued by that applicant. The Board observed that "the applicant has not offered the Board any evidence on which the Board could act to exercise its discretion and order a vote pursuant to section 60", declined to do so and dismissed the application.

11. The applicant in *Sigal Shirt Company Limited*, then applied for reconsideration and, in support of that application, filed a document on which a number of signatures appeared below a statement that the undersigned employees were signing "this Petition in support of an application ... for reconsideration of [the dismissal of the application] and in the alternative ... for a reconsideration by the Board for a further [sic] representation vote to determine whether the [union] has sufficient support to represent the employees of the proposed bargaining unit." In its decision dismissing this application for reconsideration (reported at [1982] OLRB Rep. Nov. 1720), the Board made these observations:

5. ...The central issue in section 60 is whether, *at the time* of the entering into of the recognition agreement, the respondent was entitled to represent the employees in the bargaining unit. From the agreed facts before the Board it was clear that such entitlement existed on June 25, 1982. Indeed, it was conceded by the applicant at the previous hearing in this matter that the respondent's support as it existed on June 25, 1982 was not being challenged. Although the petition is undated, the text indicates that it was composed and circulated sometime after the Board's decision in this matter. It does nothing to unsettle the Board's conclusion regarding the strength of the respondent's support as of June 25, 1982.

6. With respect to the ordering of a vote, the Board has discretion under section 60(2) to hold a representation vote *before* disposing of an application under section 60(1). This section does not give the Board a general power to resort to a Board-supervised vote as an aid in resolving a question of employee wishes where the evidence shows that at the relevant time (June 25, 1982) the respondent was entitled (in this case majority support) to represent the employees in the bargaining unit. The signatories to the petition may well have wished to show they no longer support the respondent. However, this has no effect on a section 60 application in that the relevant time for determining the entitlement of the respondent to representation rights is the date when the recognition agreement was entered into. A representation vote can only be ordered where there is a lack of certainty as to the entitlement as of that date and a vote is necessary to resolve that uncertainty....

The very careful language of these paragraphs implicitly recognizes that a petition which *had* been in existence at the relevant time, and therefore spoke to the wishes of employees as at that time, might have unsettled the conclusion regarding the respondent's support which would otherwise be drawn from evidence that a majority of employees in the unit were members at that time.

12. Neither these nor any of the other cases cited by counsel for the union support the proposition that evidence that a majority of employees in the unit were members of the respondent union at the time the employer granted it recognition is *conclusive* of the question whether at that time the union was "entitled to represent the employees in the bargaining unit" for the purposes of section 60. We are not aware of any decision which supports that proposition. The analysis in *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, seems inconsistent with it. In any event, the proposition is inconsistent with the general scheme of the Act, and we reject it. Evidence of their membership in a trade union is rebuttable, not conclusive, evidence of the desire of employees to be represented by that trade union in collective bargaining with their employer.

13. A voluntary petition is documentary evidence of the desire of its signatories with respect to representation by the union named in it. If it was in existence at the time as of which a respondent trade union was granted voluntary recognition, such a petition *is* relevant evidence with respect to the issues of representational entitlement in an application under section 60. The mere fact that the petition may also have been filed in a previous proceeding does not itself affect the petition's admissibility or relevance. The evidentiary value of a combination application for membership and receipt card is adversely affected by its having been filed in a previous proceeding only if and to the extent that it became the subject of some determination in that proceeding. The same is true of any other documentary evidence of membership or of employee wishes, including a petition.

14. Unless they had purported to act on his behalf in making that agreement and had had actual or ostensible authority to do so, the agreement of Messrs. Meinsinger and Marchand to "withdraw" what is referred to in the Minutes of Settlement as "their Statements of Desire" would not impose on the applicant (or any other employee) any contractual obligation not to make use of the petition evidence filed with the Board. There is no suggestion that Messrs. Meinsinger and Marchand had actual authority to act on the applicant's behalf, nor is the appearance of the applicant's signature on the petition, whether as witness or otherwise, a sufficient basis for ostensible authority. An employee's signature on a petition signifies nothing more than his or her agreement with the statement set out in the petition document. Unless that statement expressly so provides, an employee's signature on the petition does not confer general representational authority on the person who solicits the signature or on the person who later files the petition or on any employee who may attend at hearing in person or by representative to prove that the petition represented the wishes of the signatories at the time they signed. No one who acts in any of those roles thereby has ostensible authority to speak in the names of the signatories in matters affecting their rights.

15. Furthermore, it does not even appear from the Minutes of Settlement that Messrs. Meinsinger and Marchand purported to act on behalf of anyone but themselves. While their signatures appear below the words "for the Petitioners" on the last page of the Minutes of Settlement, the word "Petitioners" in this context is merely the style assigned to Messrs. Meinsinger and Marchand in the title of the Minutes, where they are described this way: "Gary Meisinger and Mark Marchand (hereinafter referred to as the 'Petitioners')".

16. It follows that the settlement which we are asked to enforce against the applicant is not one by which the applicant is contractually bound. It does not necessarily follow, however, that we should ignore the settlement agreement in dealing with this application. We still have to consider the fact that the agreement was in settlement of proceedings in which the Board would otherwise have had to deal with the issue now raised before us: the effect of this petition on the applicant's claim to the right to represent employees in the subject unit at the time the settlement was made. The petition would have been given no effect in that regard unless it were found to be voluntary. The voluntariness of the petition was clearly a matter of controversy. The trade union was alleging that the employer had committed unfair labour practices so inimical to the free expression of employee wishes as to warrant certification without a vote under section 8 of the Act. Proof that such unfair labour practices had occurred before or while the petition circulated would have precluded a finding that the petition was voluntary.

17. Had the hearing of the certification application gone ahead, the issue of the voluntariness of the petition would have been determined on the evidence and argument put before the Board by the trade union, the employer and any employees who actually attended and participated in the hearing. Employees duly notified of the hearing who did not attend or participate in it would nevertheless have been bound by the result of the hearing. Had the parties and all employees pres-

ent for the hearing agreed that the petition was not voluntary, the Board could have acted on that agreement without inquiring into the issue. Except on the ground that the agreement was collusive and fraudulent, no employee who had had notice of the hearing could subsequently have challenged the result on any ground premised on the voluntariness of the petition. When a factual issue which has clearly arisen in proceedings before the Board is settled by agreement on all those who would otherwise have participated in the litigation of that issue, the efficacy of the settlement should not depend on whether the Board has acted in reliance on the agreed fact, as long as the participants have so acted.

18. When the settlement agreement in question here was made, the voluntariness of the petition was a matter which had to be negatived before either the employer or the union could prudently enter into a voluntary recognition agreement. Otherwise, both parties would forever have been vulnerable to the argument that, by analogy with the reasoning in *Trent Metals Limited*, *supra*, voluntary recognition in the face of voluntary petition activity constituted employer support which should attract application of sections 13 and 48 of the Act even after the expiry of the one year period in section 60. The settlement agreement in this case provides that "... any matters that were raised or could have been raised over any matter to date are hereby fully and finally settled." The voluntariness of the petition is clearly a matter which had been raised and which the agreement purported to settle by effectively treating the petition as not voluntary.

19. Counsel for the applicant conceded in argument that the settlement agreement would have precluded his relying on the petition now if that agreement had been made by all those in attendance on the morning of the hearing after the expiry of the customary half hour from the time of hearing specified in the Board's notices of hearing. He argued that this agreement did not have the effect because it had been made on the day before the scheduled hearing, when it could not be known who would attend the hearing and it could not be said, therefore, that the agreement had been made by all those who would have participated in the litigation of the issue had the hearing proceeded.

20. For reasons which should be clear at this point, the parties to the settlement agreement ought to have delayed finalizing it until they could be sure that they had the concurrence of every employee who would have participated in the litigation of the issues to be settled. They could only have been sure of the identity of those employees on the scheduled hearing date after the expiry of the customary half hour from the time of hearing specified in the Board's notices of hearing. By concluding the agreement some hours before that time, they left open the possibility that there might be some employees as against whom the Board would not later consider the issue of the petition's voluntariness "settled". Does the applicant Eugene Marks fall into that category?

21. The hearing of November 8, 1985, was never cancelled. There is no suggestion that Mr. Marks (or anyone else) attended at the Board on that date intending to assert the voluntariness of the petition. The very short period of time between the settlement and the time of the scheduled hearing together with the very long period between then and the filing of this application are inconsistent with Mr. Marks' having then had the intention to independently assert the voluntariness of the petition. Having regard to the rationale for a concession that the settlement agreement would have precluded Mr. Marks' asserting the petition to be voluntary in this application if that agreement had been made at the appropriate time on the following day, at the conclusion of argument it appeared to us that the timing of the agreement was a distinction without a relevant difference as it applied to Mr. Marks. In the complete absence of any claim that he had sought, or even intended, to participate in the hearing of the certification application independently of Messrs. Meinsinger and Marchand, we concluded that, as against him, the settlement agreement should have the same effect as if it had been made at hearing after the period of grace had expired by all

those then present. This meant that the petition should be considered involuntary and, therefore, given no weight in determining employee wishes as of the time voluntary recognition was granted.

22. Accordingly, we ruled orally that the petition would not be relevant in this application to the question whether the union was entitled to represent employees in the bargaining unit. As the implications of the facts recited in paragraph 3 of the parties' agreed statement of fact were uncontroverted if the petition was treated as irrelevant, we dismissed the application with reasons to follow. These are our reasons for that decision.

0211-87-R Labourers' International Union of North America, Local 506, Applicant v. **Menkes Developments Inc.**, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Respondent asserting that the bargaining unit proposed by the applicant would encompass employees covered by a collective agreement it has with MTABA - Intervener claiming it represents all non-ICI construction labourers who are employed in accordance with the MTABA agreement - Board finding bargaining rights of intervener not encompassing all of the non-ICI sectors of the construction industry - Not necessary to apply MTABA agreement to dispose of the application - Bargaining unit described as excluding persons covered by subsisting agreements

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *Mike Mihajlovic* and *Bernard Fishbein* for the applicant; *Richard J. Charney* and *John Formusa* for the respondent; *Jules Bloch*, *Alison Hudgins* and *R. Lotito* for the intervener.

DECISION OF THE BOARD; June 22, 1987

1. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

2. The Board finds that the applicant is a trade union within the meaning of sections 1(1)(p) and 117(f) of the Act and is an affiliated bargaining agent of a designated bargaining agency. Pursuant to the designation by the Minister under section 139(1) of the Act on September 30,

1983, the designated employee bargaining agency is the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

3. In the application filed with the Board, the applicant seeks to be certified for the following unit of employees of the respondent:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foreman [sic] and persons above the rank of non-working foreman.

all construction labourers in the employ of the respondent in Ontario Labour Relations Board Area #8, excluding the industrial, commercial and institutional sector, save and except non-working foreman [sic] and persons above the rank of non-working foreman.

4. Pursuant to the Board's Rules of Procedure, the respondent filed a reply, a list of employees (which it subsequently sought to amend), and specimen signatures for those employees. In its reply, the respondent states that it is a member of the Metropolitan Toronto Apartment Builder's Association (the "MTABA") and that, as such, it is bound by the collective agreement between the MTABA and the Labourers' International Union of North America, Local 183 (the "MTABA" Agreement). The last such agreement, according to the respondent, had an expiry date of April 30, 1987 but has been renewed. The respondent asserts that the bargaining unit proposed by the applicant would encompass employees covered by the MTABA agreement. The bargaining unit proposed by the respondent in its reply is:

all construction labourers in the employ of the respondent in the industrial commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

all construction labourers in the employ of the respondent in Ontario Labour Relations Board Area #8, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and excluding all employees represented by Labourers' International Union of North America, Local 183 and performing work under the collective agreement between Labourers' International Union of North America, Local 183 and the Metropolitan Toronto Apartment Builders' Association.

5. The Labourers' International Union of North America, Local 193, ("Local 183") filed an intervention with respect to this application. In paragraph 3 thereof, it asserts that Menkes Properties is bound by the MTABA agreement. Local 183 also asserts, in Schedule A to its intervention, that the respondent is a member of the MTABA and is therefore also bound by the MTABA agreement, and that it therefore holds the bargaining rights for some of the employees for whom the applicant seeks to be certified herein, namely, all construction labourers employed by the respondent in Board Area 8, excluding the industrial, commercial and institutional ("ICI") sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman, who were employed in accordance with Article 1 of the MTABA agreement. The intervener also purports to "reserve the right" to seek a declaration that the res-

pondent is "a related employer to Menkes Properties". In its intervention, Local 183 submits that this application should be restricted to the ICI sector of the construction industry.

6. At the outset of the hearing with respect to this matter on June 5, 1987, counsel for the respondent moved that the hearing of this application should be adjourned for two reasons. First, he argued that it would be necessary for the Board to interpret and apply the MTABA agreement, specifically the extent of the bargaining rights held by Local 183 thereunder, in order to dispose of this application. He advised the Board that that very question is before the Board in other proceedings and submitted that it would be appropriate to await the results of those proceedings before continuing the hearing with respect to this application. Second, he acknowledged that the respondent and Menkes Properties were likely related employers within the meaning of section 1(4) of the Act and that, the issue having been raised, the proceedings should be adjourned in order to give the appropriate notice to the affected employees.

7. Counsel for Local 183 argued against the adjournment. He submitted that there was no reason to adjourn pending the Board's decision with respect to the MTABA agreement in other proceedings. He also asserted that the circumstances of this case did not require that notice of the subsection 1(4) issue be given to employees.

8. The applicant accepted that there is a subsection 1(4) kind of relationship between the respondent and Menkes Properties. It also accepted that the MTABA agreement applies to some of the employees who would be covered by the bargaining unit applied for to the extent that it is prepared to agree that all construction labourers employed by the respondent on the date of application in other than the ICI sector of the construction industry were covered by the MTABA agreement. Counsel for the applicant made it clear that the applicant does not seek to displace Local 183 as the bargaining agent for any of the respondent's employees that it presently represents and that the applicant is content to have the bargaining unit described in terms of unrepresented employees. He pointed out that the subsection 1(4) issue is one that has been raised by the respondent and the intervener, not by the applicant, and that that issue should not be permitted to delay this application. Counsel also submitted that there was no reason to adjourn this proceedings pending the outcome of the other proceeding with respect to the extent of the bargaining rights held by Local 183 under the MTABA agreement, particularly since the applicant was not a party to those other proceedings.

9. The Board adjourned to consider the representations of the parties. Upon returning, the Board ruled orally that the proceeding would not be adjourned. The Board's reasons for this oral ruling follow.

10. An application for certification which relates, as this one does, to the ICI sector of the construction industry must, pursuant to section 144(1) of the Act, be made with respect to a bargaining unit that includes all employees who would be bound by a provincial collective agreement together with all other employees in at least one appropriate geographic area, unless bargaining rights for such geographic area have already been acquired. The material before the Board indicates that the respondent employed construction labourers only in Board Area 8 on the date that this application was made. The parties agree that Local 183 holds bargaining rights for some of those construction labourers pursuant to the MTABA agreement. They also agree that Local 183's bargaining rights, whatever they might be, do not extend into the ICI sector. Nor do Local 183's bargaining rights with respect to the respondent encompass all non-ICI sectors of the construction industry in Board Area 8. The applicant does not seek to obtain any of the bargaining rights presently held by Local 183 and, in effect, concedes that there were no affected non-ICI employees at work for the respondent on the date of application. In other words, whatever bargaining unit is

appropriate in this case, there were no "other employees" for whom the applicant seeks bargaining rights in it on the date of application; that is, there were no unrepresented non-ICI construction labourers employed by the respondent on that day.

11. In our view, none of this precludes the Board from determining the unit of employees that is appropriate for collective bargaining in this case, or from proceeding with the application. The applicant is, in effect, seeking to be certified for a unit of employees of the respondent which includes all construction labourers who would be bound by a provincial collective agreement (that is, those employed in the ICI sector), and all other construction labourers other than those covered by the MTABA agreement, of which there were none on the date of application, in Board Area 8. There is nothing in section 144(1) that requires an applicant seeking certification thereunder to seek bargaining rights with respect to any "other employees in at least one appropriate geographic area" for whom bargaining rights have already been acquired. Such an applicant is only required to seek, as the applicant does, bargaining rights for such employees who are unrepresented. In this case, the only appropriate geographic area is Board Area 8 (see *E/E Fradema Masonry* [1986] OLRB Rep. Dec. 1685). The fact that there were no unrepresented "other employees", that is, no non-ICI sector construction labourers, employed by the respondent in Board Area 8 on the date of application does not affect the applicant's right to seek, by way of an application under section 144(1) of the Act, those non-ICI bargaining rights with respect to the respondent which are not presently held by some other trade union (see *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697 and *The Georgian Building Corporation*, [1981] OLRB Rep. March 275). In *The Georgian Building Corporation*, *supra*, a trade union other than the applicant therein held bargaining rights for those construction labourers employed by the respondent in that case in the residential sector of the construction industry in Board Area 8. Dealing with the respondent's argument that the applicant was not entitled to make its application under section 144(1) or, in the alternative, that it was only entitled to apply for bargaining rights in the ICI sector, the Board held, at paragraphs 23 to 25, that:

23. A series of cases involving the certification of Local 183 or Local 506 was recently heard by a five-man panel of this Board. In *Pelar Construction*, [1981] OLRB Rep. Feb. 210 which was one of the cases in that series, the Board reviewed its historical treatment of certification applications filed by those two locals and the impact of section 131a thereon. The Board concluded:

"18. ...In view of the foregoing reasons, therefore, we are of the view that both Local 506 and Local 183 are entitled at their option to apply under either subsection 1 or subsection 3 of section 144. In such applications, the Board will follow the mandatory directives of the relevant subsections.

19. In this regard, we should like to emphasize the approach the Board has taken to the certificates granted by virtue of subsection 2. Where an application has been made under subsection 1 and the appropriate unit of employees is found to include employees in the industrial, commercial and institutional sector throughout the province and employees in sectors other than the industrial, commercial and institutional sector in a local geographic area, the Act directs the Board to issue two certificates. Subsection 1 indicates that such an application is 'on behalf of all affiliated bargaining agents in the employee bargaining agency'. Thus, the Board issues one certificate to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents in the employee bargaining agency with respect to employees in the industrial, commercial and institutional sector in the Province of Ontario. The second certificate is issued to the applicant for sectors other than the industrial, commercial and institutional sector in the appropriate geographic area. Thus, in the present circumstances regardless of which local either 183 or 506 applies under subsection 1, the applicant is certified on its own behalf and on behalf of the other affiliated bargaining agents in the employee bargaining agency for the industrial, commercial and institutional sector. That is to say, Local 506 is certified on behalf of Local 183 amongst others, and Local 183 is certified on behalf of Local 506 amongst others in relation to the industrial, commercial and institutional sector of the construction industry.

20. If the application is made under section 144 with respect to sectors other than the industrial, commercial and institutional sector, then the applicant will be certified in Board Geographic Area #8 for all sectors other than the industrial, commercial and institutional sector. A number of these sectors have been traditionally within the jurisdiction of Local 183. However, at the hearing in this matter counsel for Local 183 recognized that this was the consequence of the position taken by Local 183 and, did not urge the Board to take any other position with respect to these other sectors. In our view it is clear that in the near future both Locals are going to have to make some accommodation with each other in order to deal with this situation."

24. Although both the applicant and the respondent submitted that the Board should issue only one certificate (i.e., a province-wide industrial, commercial and institutional sector certificate), section 144 requires the Board to issue two certificates in the instant case. As noted by the Board in *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, section 144 "requires that a bargaining unit relating to the industrial, commercial and institutional sector also encompass all other sectors in an appropriate geographic area unless the bargaining rights for the area have already been acquired." In the present case, bargaining rights for all sectors in Board Area #8 other than the industrial, commercial and institutional sector have not already been acquired; only bargaining rights for the residential sector have already been acquired (by Local 183). Accordingly, the Board finds that bargaining rights in all sectors in Board Area #8 other than the industrial, commercial and institutional sector have not "already been acquired under subsection 3 or by voluntary recognition" within the meaning of section 144(1).

25. In interpreting section 144, the Board must have regard to *The Interpretation Act*, R.S.O. 1970, c. 225. Of particular significance in the present case are the following sections:

"8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act.

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that seems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

The preamble to *The Labour Relations Act* provides as follows:

"Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Having regard to those legislative provisions, the Board cannot accept the construction of section 144 advocated by counsel for the respondent. Harmonious relations between employers and employees would not be furthered, nor would the practice and procedure of collective bargaining be encouraged by that construction which would preclude certification in respect of some employees who would not otherwise be beyond the purview of the certification procedures under the Act. Such an interpretation might well result in a resurgence of recognition strikes, the elimination of which is one of the purposes of the certification procedures of the Act. The Board has a well-known and long standing practice of preserving existing bargaining rights by excluding from bargaining units employees covered by subsisting collective agreements. In the absence of a clear and specific legislative direction to the contrary, the Board is of the view that it is appropriate, having regard to the preamble and the general scheme of the Act, to maintain that practice which promotes industrial peace and stability by recognizing and preserving existing bargaining rights. (Employees covered by subsisting Board certificates and subsisting written voluntary recognition agreements should also be excluded to preserve any such additional bargaining rights which might be in existence.)

We agree with and adopt that reasoning. Whatever the extent of the bargaining rights held by

Local 183 with respect to the respondent, they do not encompass all of the non-ICI sectors of the construction industry. In our view, it is neither necessary nor desirable for the Board to interpret and apply the MTABA agreement in order to dispose of any part of this application.

12. In the circumstances, we saw no reason why the bargaining unit could not be described in the same manner as in *The Georgian Building Corporation, supra*. Accordingly, the Board ruled orally, and hereby confirms, that, pursuant to section 144(1) of the Act, all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman, and persons covered by subsisting collective agreements, certificates of the Ontario Labour Relations Board, or written voluntary recognition agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. With respect to the second basis for the respondent's motion that this matter be adjourned, the applicant seeks certification with respect to certain employees of Menkes Developments Inc. only. Insofar as the relationship between the respondent and any other employer is raised at all, it is raised by Local 183 and the respondent. Even then, there is no actual request for relief under subsection 1(4) of the Act before the Board either in the manner contemplated by section 27 of the Board's Rules of Procedure or otherwise. Any issue with respect to the relationship between the respondent and any other employer is not one in which the applicant is, for purposes of this application, involved. Accordingly, and having regard to the bargaining unit description the Board has found to be appropriate, we found that the subsection 1(4) issue was not properly before the Board, and is not material to the Board's considerations in this proceeding.

14. The list of employees filed by the respondent contained 39 names. By letter dated June 2, 1987, the respondent added three more names to the list. Subsequent to the Board's ruling with respect to the respondent's motion and the bargaining unit description as aforesaid, the parties were able to agree that 23 of the persons named on the list were covered by the MTABA agreement and should be deleted from the list. The respondent sought to add 2 names, John Richardson and Rodrigues Therriault to the list. The applicant objected to the addition of these 2 names as being an abuse of the Board's processes. However, the applicant asserted the Terry McEvoy should be added to the list as being a person employed in the bargaining unit found by the Board on the date of application. The respondent agreed that Terry McEvoy was employed in the bargaining unit on the date of application but took the position that if Richardson and Therriault could not be added, as it asserted they could, neither could Terry McEvoy. In addition, the applicant challenged the inclusion of Richardson, Therriault and 6 other persons, namely Mark Ferguson, Duncan McKirdy, Lorenzo Ventura, Chris Lindsay, Danny Marston and Clemente Villani on the basis that they were not properly included in the bargaining unit. Subsequently, by letter from counsel dated June 17, 1987, the respondent also sought to add Dale Ince to the list of employees.

15. Although it is unclear how many of the individuals challenged fall within this category, one of the bases upon which the applicant challenges the inclusion of some of them is that although they may have been doing bargaining unit work on the date of application, they are usually and commonly employed by the respondent doing other than bargaining unit work and should therefore not be considered to be in the bargaining unit for the purposes of the count in this application. In making this challenge, the applicant asserts that the Board should, in the circumstances of this

application, depart from the test enunciated in *E & E Seegmiller Ltd.*, [1987] OLRB Rep. Jan. 41 and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 in favour of some other, as yet unspecified, test.

16. Having regard to the nature of the challenges being made by the applicant, the Board ruled that it would hear the evidence and representations of the parties with respect to all matters in dispute rather than authorizing an officer to inquire into and report to it with respect to the list and composition of the bargaining unit.

17. Accordingly, the Board directs that this matter be scheduled for hearing before this panel beginning on July 13, 1987 and continuing if necessary, on July 16 and July 17, 1987. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to this application and, without limiting the generality of the foregoing, specifically with respect to:

- (a) the addition of John Richardson, Rodrigues Therriault, Dale Ince, and Terry McEvoy to the list of employees in the bargaining unit;
- (b) the applicant's challenges to the presence of Mark Ferguson, Duncan McKirdy, Lorenzo Ventura, Chris Lindsay, Danny Marston, Clemente Villani and, if necessary, John Richardson, Dale Ince, and Rodrigues Therriault, on the list of employees.

18. The respondent is directed to forthwith provide to the Board the most recent addresses it has for the persons listed in paragraph 17(b) herein so that they can be summonsed to attend the hearing by the Board and, so far as it is able, to ensure that these persons are available to be examined before the Board on the day scheduled for hearing.

19. The applicant is directed to provide to the other parties and to the Board the particulars of the basis for each challenge that it has made, no more than seven days prior to July 13, 1987.

20. The matter is referred to the Registrar.

0026-85-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800, Applicant v. **Northern and Central Gas Corporation Limited**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Whether persons engaged by the respondent as construction inspectors exercising managerial functions - Jurisprudence on managerial functions reviewed - During pre-engineering phase inspectors acting in an advisory and technical role - During construction phase inspectors ensuring government standards for the installation of gas pipelines adhered to - Inspectors exercising functions of a para-professional possessed of technical expertise - No direct influence on employment relationship - Inspectors not exercising managerial functions - Certificate issuing for unit consisting of all senior and junior construction inspectors

BEFORE: *Thomas S. Kuttner*, Vice-Chair, and Board Members *W. H. Wightman* and *S. O'Flynn*.

APPEARANCES: A. J. Ahee, N. W. Meikle and M. Zangari for the applicant; J. R. Hassell, H. E. Holt and J. A. Boegel for the respondent; Wayne Dashney and David Dowdall for the objectors.

DECISION OF THOMAS S. KUTTNER, VICE-CHAIR, AND BOARD MEMBER S. O'FLYNN;
June 30, 1987

1. In this case, persons engaged by the respondent as construction inspectors operating out of its offices in North Bay, Ontario seek the benefits of collective bargaining entrenched in the *Labour Relations Act*. On their behalf, the applicant, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800 ("the Union") makes this application for certification seeking to represent them as their bargaining agent for purposes of the Act. Their employer opposes this application. So too do the two objectors who have appeared before us. The opposition of the latter to the extent that it can be said to be an objection by employees to certification of a trade union could not, in light of the membership evidence filed, have an impact on these proceedings, and has not for those purposes been taken into account in the Board's decision. The opposition of the former (and in this respect supported by the objectors) is more fundamental, for the respondent argues that inasmuch as those engaged as construction inspectors exercise managerial functions on its behalf, section 1(3)(b) of the Act banished them from its ken and protective embrace. The grant of a certificate by the Board rests on its determination of that issue, and the question for us is a narrowly focused one: Do those engaged by the respondent as construction inspectors exercise, in the opinion of the Board, managerial functions?

2. Prior to addressing that substantive issue, the Board makes several preliminary findings and observations. First, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act. Second, the Board notes that in its decision of April 30, 1985 before a panel of the Board differently constituted, it declared the appropriate bargaining unit to be, on agreement of the parties: all senior construction inspectors and junior construction inspectors of the respondent in and out of North Bay, Ontario. At that same time the Board appointed a Labour Relations Officer to enquire into and report back to the Board on the duties and responsibilities of the persons employed by the respondent who occupy the position of Senior Construction Inspector and of Junior Construction Inspector. Such an enquiry was conducted, and by agreement of the parties and in accordance with the provisions of paragraph 8 of Board Practice Note No. 4 and the evidence of Dennis Corbeil, R. Farmer and Wayne Dashney, is representative of the duties and responsibilities of all inspectors of either class. Finally, the Board notes that in the event it is satisfied that the persons in dispute are employees within the meaning of the Act, then, on the basis of the membership evidence filed, the applicant would be entitled to a certificate pursuant to section 7(2) of the Act without the taking of a representation vote. The Board turns now to the evidence and jurisprudence on the principal issue.

3. First the law. Ours is a statute in common with that in all North American jurisdictions which reflects a deep and pervasive conflict within a common industrial relations culture: that between capital and labour. These are collective forces within our economy and our society and the reality of the conflict between them dictates that each person in the work place be faced with a fundamental choice: with which of these collective forces is his or her lot to be cast. The great labour law theoretician, Otto Kahn-Freund, writes with much perception and profundity of this conflict and struggle for power in his essay "Some Reflections of Law and Power" in *Labour and the Law* (1972). He notes there that as law in general is but a technique for the regulation of social power, then must the principal purpose of labour law in particular be "to regulate, to support, and to restrain the power of management and the power of organized labour" (*ibid.* p. 5). Our Act draws the line between labour and capital in the dichotomy between those who manage and those

who are managed. It is the latter, "employees" in the statutory language, who enjoy the freedom declared by our legislators at section 3 of the Act "to join a trade union ... and to participate in its lawful activities." To the former, exercise of power rests not in such collective action but by mere identification with capital as managers.

4. In the great bulk of cases, the individual person at the work place perceives almost intuitively his or her relationship with the enterprise and there is no need to ask the question - employee or member of management? But the complexity and the multifarious forms of the modern enterprise, shaped and formed by an almost incomprehensible number of post-industrial technologies themselves in a constant state of flux can, and perhaps increasing more so, does give rise to a crisis of identity when that question is put. In such cases, thrust upon the Board as part of its general power of superintendence over the statute, is the task of answering that question, of quieting the uncertainty and of declaring on which side of the conflict the individual's loyalties must lie. This is the function of an enquiry under section 1(3)(b) of the Act.

5. Extensive is the jurisprudence of this and other labour relations boards upon the issue of managerial functions, and vast the bulk of cases in which it has been articulated. Of course each case must in the final analysis rest on the particular contours of its facts. Nevertheless, from this mass of decisions can be culled general principles which facilitate and channel the fitting of the law to the facts. First, there can be no doubt that the rationale which animates and informs the managerial exclusion is the conflict theory, i.e. the avoidance of divided loyalties on the part of those who participate in the management of the enterprise towards those for whom they manage and those whose lives are affected by their management. An arm's length relationship is required by the process of collective bargaining enshrined in the Act.

"... the very spirit of the legislation and the cases before the Board that have invoked that spirit resulted because of a potential for a conflict of interest with respect to certain issues of collective bargaining." (*The Hydro-Electric Power Commission of Ontario*, [1971] OLRB Rep. Aug. 501);

"The identification of management is fundamental to the scheme of collective bargaining as set out in the *Labour Relations Act*. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other" (*Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 at 399).

6. Secondly, because "managerial functions" are an abstract concept in the statutory scheme of things, which will assume a different guise dependent on their setting within the particular work place and enterprise, the Board has identified two 'benchmark situations' within which, by the application of cogent criteria concrete form might be given to the statutory term in the wide range of cases which present themselves. This analysis of the Board jurisprudence was first expansively articulated in *Inglis Limited*, [1976] OLRB Rep. June 270, and quickly came to dominate the Board's approach to the issue of managerial functions. Thus, shortly after the issuance of that decision, the then Chairman of the Board, Professor Carter, summarized the thrust of the *Inglis* case in *Chrysler Canada Limited*, *supra*, as follows:

"The *Inglis Limited* decision, recognizing that the exercising of managerial functions may assume different forms, identifies two benchmark situations - one where there is a direct influence upon the employment relationship, and one where the influence upon the employment relationship is only indirect. These situations, of course, are only benchmarks and there is the possibility of many variations between them, but they do serve to explain the different approaches taken by the Board. It can be said, therefore, that, the more indirectly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to independent decision making as the criterion for identifying that person as management. Conversely, the more directly the exercise of a person's job responsibilities influences the

employment relationship of others, the more the Board looks to effective control or authority over other persons as the criteria." (pp.399-400)

It is this approach, measuring the facts before us in the case of job responsibilities which influence the employment relationship of others only indirectly against a standard of independent decision making, and those which exercise such an influence directly against a standard of effective control or authority which the Board adopts in making the determination here asked of us.

7. There can be little doubt that in enquiries of this sort, the onus of proof is cast upon the party which would assert the exercise of managerial functions. The tenor of the Board's jurisprudence is uniform in this respect, and this is as it should be, for the effect of a finding of the exercise of such functions is to deprive the person affected of the right to enjoy the very real benefits and protections conferred by the statute. Thus, here, the respondent, which alleges the exercise of managerial functions by those engaged as construction inspectors, should be put to the strict proof thereof. This is the more so in cases such as this where the overwhelming majority of persons who are to be affected by our determination have clearly indicated a desire to partake of the fruits of the Act. That impressive expression of desire coupled with the statutory declaration found in the Preamble to the Act that "... [I]t is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees" creates a resonance within which our enquiry must take place. The Board turns now to the facts as presented.

8. As noted earlier, the evidence of three individuals, all senior construction inspectors, was taken as representative of the duties and responsibilities of the class of persons for whom bargaining rights are sought. In addition, the Board had the evidence of the Chief Engineer of the respondent, Dick Henderson, which was of great assistance not only in clarifying those duties and responsibilities but as well as in outlining the general framework within which they are performed in the respondent's enterprise. The respondent is a major distributor of natural gas, and here we are concerned with a particular facet of that process, the construction of gas distribution systems throughout Ontario. These systems convey natural gas from Trans Canada Pipeline's main trunkline to the various towns and municipalities with which the respondent has contracted for such services. The company's gas distribution systems' offices are located in North Bay, Ontario. Typically, there would be at any one time a number of projects underway throughout Ontario and over the past four years the average dollar value of such projects would be ten to fifteen million dollars per year. More recently, the respondent has been engaged in a major project of unusual size and value - the Northshore Project whose estimated worth is \$50 million. Other projects referred to in evidence ranged from a quarter of a million to four million dollars in value. Construction inspectors operate out of the respondent's engineering department, and typically there would be some 25 engaged in any one construction season. The distinction between senior and junior construction inspector is related to experience and years of service with the respondent. Their duties and responsibilities are essentially identical. There is a distinction as well between permanent and temporary inspectors, the latter being engaged seasonally between the period of construction activity in late spring through to early winter, the former continuing on through the winter season during which pre-engineering activities of layout and planning are performed. These are salaried employees, their salaries calculated on the basis of a 35-hour week with allowance made for the payment of overtime up to a maximum of 60 hours per week in accordance with a formula established on a notional total of hours worked annually calculated at 35 hours per week.

9. The organizational structure of the Engineering Department is straightforward. At the summit of the hierarchy stands the Chief Engineer, Mr. Henderson. He is located more or less permanently at the North Bay office although he estimates that he would spend approximately one

week per month in the field during the construction season. Immediately beneath him in the line of command is the Chief Inspector who spends the bulk of his time during the construction season in the field visiting the various construction projects, and present at the North Bay office only Mondays, Friday afternoons and Saturday mornings. Immediately under him are the two supervisors of construction inspection, Mr. Andryachen and Mr. Lathen. These latter, like the Chief Inspector, spend a great bulk of their time out in the field at the various projects. The size of the Northshore project has somewhat altered the normally peripatetic nature of Mr. Lathen's work, and the evidence shows that during its currency he was present there on close to a permanent basis. Under the two supervisors stand the ranks of the construction inspectors. The organization of the Engineering Department is of course integrated with that of the respondent's enterprise as a whole. For our purposes, it is worth noting that in the Operations Department of the respondent is found a Regional Project Supervisor who would exercise managerial authority over the various projects as well.

10. In order to qualify for the position of inspector with the respondent, one must be certified as a pipeline inspector by the Provincial Ministry of Consumer and Commercial Relations. Certification is awarded following upon successful completion of an examination based upon the Gas Pipelines Systems and Materials Code issued by the Canadian Standards Association, colloquially referred to as the Z184 Code. By its own terms, the Z184 Code is meant "to establish essential requirements and minimum standards for the design, installation and operation of gas pipeline systems" (p. 19). The employer has issued its own standard practice manual (the SPM) which is a design and construction manual which outlines in minute detail the manner in which the standards established by the Z184 Code are to be implemented in actual pipeline construction. Intimate familiarity with both the Z184 Code and the respondent's SPM is a necessary qualification for the position of inspector. More formal advanced training is not required, although one of the inspectors examined, Wayne Dashney, is certified as an engineering technologist having completed a formal course of several years' duration to obtain that qualification. The functions and duties of the inspectorate can be conveniently classified into two stages: the pre-engineering phase and the construction phase. Our analysis of their duties and responsibilities against the two benchmarks established by the Board jurisprudence will follow that dichotomy.

The Pre-Engineering Phase

11. The pre-engineering function involves the selection of locations for the gas distribution system, both major laterals into the municipalities and feeder lines to the individual customers. This work is principally done during the off construction season. It involves the selection of location for the mains, the arrangement for authorization from municipal authorities and the estimating of quantities of rock, asphalt, gravel, sod and other materials required to be excavated, removed and replaced in the process of the laying of the pipeline. The actual obtaining of contracts for distribution of product is handled through the respondent's Sales Department. Engineering is then advised that a distribution system will be required to convey product to the particular municipality and customer. Inspectors are assigned to rough out the actual route of the line or lines required based upon ground conditions, conflicting property interests of both property owners and easement holders, and the requirements of municipal bylaws. There is some degree of discretion exercised in selecting the best location for the laying of a line, although within certain established standards. The inspector comes onto the site armed with the Z184 Code and the SPM. Lines can only be laid within a defined proximity of property lines. Other utilities' easements must be accommodated, e.g., Hydro and telephone lines. The condition of the soil must be assessed to determine suitability for line placement, the objective being the most effective and cost efficient distribution system. Thus a particular street or side of a street may be chosen to avoid the cost of blasting and rock removal. Attempts are made to avoid conflict with sidewalks, curbs and pavement for their

removal and replacement is a cost factor. In all of these determinations, the inspector relies upon his technical expertise and experience in pipeline construction.

12. Once a draft location for the distribution system has been selected the inspector must obtain the necessary municipal approvals for such are the terms of the respondent's franchise. Typically these come from an engineering division within a municipal planning department. Approvals are not always forthcoming on the basis of the locations selected by the inspector, for what is ideally suited for the laying of a gas pipeline may be equally ideal for the laying of other municipal services - sewers, watermain and the like. Thus the inspector engages in some degree of negotiation, pressing for preferential approval of the selection system he has himself mapped out, but of course prepared to accommodate the aims and objectives of the municipal planner without whose approval no distribution system can be laid. Of course arrangements will have been made with other easement holders whose property interests may conflict prior to the issuance of such approvals. The third function performed by the inspector during the pre-engineering phase is the estimate of materials required to be removed and replaced in the process of constructing the gas distribution system. There will be rock blasting, gravel backfill, sand padding, sod, etc. Again, this data is gathered based upon the technical expertise, and perhaps even more so the construction experience of the inspector.

13. All of the foregoing material and data is then returned to the company offices in North Bay where it is assessed and analyzed. The inspector's materials estimates are used to determine unit costing of the particular construction project and this is a function performed by senior inspector personnel in the North Bay offices. The proposed line for the construction of the gas distribution system is forwarded to the drafting department for final drafting. An estimate of the total capital cost of the job is thus prepared in the North Bay offices based upon the materials estimates and pipeline location selections submitted by the inspector. He is not engaged in that costing exercise, nor in the final feasibility study for the proposed project which is carried out by another division of the respondent's enterprise. The results of the feasibility study are then reviewed by senior management personnel and a decision made whether to proceed with the particular gas distribution construction project. In none of this assessment process does the construction inspector participate. His is the function to provide those making such assessments with the raw data and information upon which they are made.

14. Once senior management has determined that a project will go forward it is put up for tender. The respondent deals with four major contractors who are engaged in the construction of gas distribution systems. Tender documents, as is usual in the construction industry, indicate minimum quantities of work required and stipulate that such are not guaranteed. Thus contractors normally take a viewing of the site in order to prepare their bids. It is the construction inspector who mapped out the particular project who guides them over the location which has by this time already been staked. His opinion is sought by contractors as to technical difficulties which might be encountered and the inspector's advice if relied upon is normally honoured by the respondent. Bids are submitted on unit prices for each phase and segment of the proposed construction project and then a total job cost estimated by a small group or team which reviews all bids submitted. The Supervisor of Capital Budgets always sits on that committee. In addition, there is the Chief Engineer who participates approximately 80 percent of the time, and/or the Chief Inspector who participates some 50 percent of the time. The remaining make-up of the team is not constant: It may be a construction inspector supervisor, it may be a member of the clerical staff or it may be one of the construction inspectors. If a construction inspector participates in the work of the team his function is principally to check the bids submitted as against his own quantity estimates, e.g., from his knowledge of the work required for a particular phase of the project he would recognize when a particular bid departs significantly from the standard deviation which might be expected in the bid-

ding process. This information would be conveyed to the contractor who might decide then to withdraw. Once all bids have been assessed, a recommendation is made by this committee to senior management as to the particular contractor to whom the contract for construction of the gas distribution system should be awarded. That decision is taken at a senior managerial level, and it is at that level too that a contract is actually concluded.

15. In any of this is there the exercise of managerial functions? The Board thinks not. The picture presented in the pre-engineering phase of a construction inspector's duties and functions is that of a group of para-professionals - professionals with significant technological expertise who, although they exercise some degree of independent discretion in the performance of their duties do so precisely on the basis of that expertise. Theirs is a data gathering, advisory and technical role in the pre-engineering phase to a large extent exercised within the framework of mandatory standards and accepted construction practices. We are dealing here with the second of the two benchmark situations already identified, where the influence upon the employment relationship is only indirect, and the criteria of independent decision making is used for identifying one as exercising managerial functions. The technical knowledge, skills and experience of the construction supervisors is indeed valuable to the respondent's enterprise, and not to be belittled, but that value does not elevate their functions from those of an employee to those of a manager. As the Board said already in *Hydro Electric Power Commission of Ontario*, [1969] OLRB Rep. Aug. 669:

The fact that an expert employee may recommend a course of action which a member of management might decide to follow does not, of itself, make the employee's recommendation a managerial function. Although a recommendation may be the basis of the decision taken, however, it is the decision to implement the recommendation which can be correctly described as the managerial function.

It is not then in the pre-engineering phase that construction inspectors exercise managerial functions. What of the construction phase?

Construction Phase

16. The functions and duties of the construction inspectors during the construction stage is more varied than is that during the pre-engineering stage and embraces both benchmark situations - those which have a direct influence upon the employment relationship and those where such an influence is only indirect. We address the latter first. How are they best to be described? They were done succinctly and accurately so by the Chief Engineer when asked by his counsel what the duties of an inspector were. He replied:

"The duties of the inspector are to first of all ensure that the standards governing the installation of gas pipelines are followed, secondly, to record what is in the ground for purpose of payment to the contractor." (Report of LRO p. 152, l. 5-10)

The actual construction of a gas distribution system is performed by the contractor and his crew. Trenches are dug, pipe laid, trenches backfilled and the construction site cleaned up. This is an ongoing and continuous process so that at any one particular project there will be a variety of crews working at different sections of the site. Lines are purged and gas introduced incrementally as different segments of the entire project are completed. This calls for installation of taps either by the construction crew or where larger bore pipe is required by the respondent's own work force - the tapmen. Throughout this entire procedure the construction inspector - or more accurately a number of construction inspectors - are constantly on the site ensuring compliance with the standards set by the Z184 Code and the respondent's SPM. In addition, they monitor general health and safety requirements legislatively established. They must of course be vigilant in their inspection of the work in progress for gas is an extremely hazardous product requiring a distribution sys-

tem meeting the most stringent of safety standards. The work progresses in accordance with detailed job specifications - all part of the contract awarded to the successful bidder. As work is completed the inspector fills out, on a daily basis, his inspection report verifying completion in accordance with contract requirements and with governing standards. The inspector brings to the attention of the contractor, through his foreman or superintendent on the job any failure to comply with contract specifications or the governing standards. Unless corrective action is taken in accordance with the inspector's instructions he will refuse to verify the work as completed in his report. Payment to the contractor is on a staggered basis as work is completed and failure to so verify the report by the inspector will result in the withholding of cheque issuance authorization by the North Bay office.

17. It is in the nature of a construction project that variances in the job specifications may be required in the light of actual conditions met on the ground. The construction inspector authorizes such variances either on his own or in consultation with his supervisors with whom he maintains contact by telephone on a daily basis i.e. within the space of two to three hours at most a supervisor of construction inspectors can normally be contacted. Variances would of course be similarly in accordance with the Z184 Code and the SPM. In addition, construction inspectors authorize the so-called 'force accounts'. The time required for the completion of any particular segment of the construction process is estimated in the job specifications. Again, conditions on the ground may require that a greater amount of time be spent than was originally foreseen. Contractors will be remunerated for such extra time on the basis of hours worked at an agreed hourly rate as stipulated in the contract. This is the force account, and again, it is the construction inspector on the job who verifies work so performed for transmission to the North Bay office where it is again approved for payment. There is some disagreement as to whether construction inspectors have the authority to remove a contractor from the site. The contract document indicates that the respondent retains such right through the Chief Engineer and his department. The Chief Engineer indicated that such authority was vested in the inspectors. There is however no indication that it has ever been exercised. Rather, where the construction inspector on the job and the contractor's foreman or superintendent disagree on whether contract and/or Z184 Code and SPM standards have been met, then unless resolved directly the matter will be referred to supervisory personnel of the North Bay Office. There, it is routine to uphold the decision as to standards and contract compliance first rendered by the inspector.

18. There is evidence as well on the authority of construction inspectors to shut down a project or portion thereof due to failure to comply with Z184 Code standards, the SPM or other safety and health standards legislatively established. There can be no doubt that the inspectors routinely issue oral compliance orders to the contractor or foreman and expect prompt compliance. In the event such compliance is not forthcoming, all witnesses maintained that an inspector could halt the disputed work. More often than not, when this occurs the inspector directs that the crew be assigned elsewhere in the project until the dispute can be resolved. However, there have been instances, few in number, where an actual shutdown has been ordered, albeit for a short time. In one instance construction warning signs had not been erected and a foreman was directed to order his crew to cease working until such was done. That particular portion of the project was shut down for approximately one half hour. It is not only in instances of standards violations that contractors might be so directed. The inspectors have general responsibility to ensure that a project is completed according to the contract schedule, and to assure such completion they will direct foremen and crew as to which particular part of the project to proceed with at any particular time. Sometimes work in one area of a project must cease and that in another commence because of commitments made by the respondent to the supply of gas product to a particular customer by a particular date. The operative word here, used throughout in the evidence of the Chief Engineer, was "co-ordination" of the project.

19. Are these tasks and functions performed by the inspectors during the construction phase managerial in nature? Again, the Board thinks not. Rather, they are again in the nature of the tasks and functions one would expect of a para-professional possessed of technical expertise. Ensuring strict adherence to clearly established standards and guidelines is the principal function being performed. This requires technical knowledge, skills and experience but does not entail the exercise of managerial functions when measured against the criterion of independent decision making. What else is an inspector to do but ensure that others comply with the standards established by some authority separate from them both? Nor is the filing of the daily inspector's report to be seen as a managerial function. True, payment cheques are issued only upon the filing of such reports, but this indicates nothing other than an accounting mechanism contractually established between the parties to the construction contract. In any event, cheque issuance is always only upon further authorization by the North Bay office. In a similar vein, the overall co-ordination of the project to ensure its completion in accordance with contract terms cannot, in these circumstances, be said to be a managerial function. As the Board stated in *Caledon Hydro Electric Commission*, [1979] OLRB Rep. Oct. 924: "Co-ordination *per se* is not a managerial activity, and may become very routine because of the enactment of rules and policies to channel working energies with the maximum certainty and efficiency" (para. 8).

20. What of the authority to enforce construction standards and health and safety regulations even to the extent of job shutdown? Is this indicative of managerial function? The Board thinks not. For surely this is nothing other than a concomitant to the general authority to ensure compliance with construction, and health and safety standards. Such a jurisdiction flows directly from the inspection process, itself premised on the technical knowledge, skills and experience of the construction inspectors. Enforcement of such standards by cease work or job shutdown orders is no more the exercise of a managerial function than is the enforcement of security provisions by security personnel in the typical industrial establishment. In both circumstances, failure to comply with the standards established by management and entrusted to a class of employees for their enforcement, calls for direct intervention by the latter in the ongoing performance at work by the infringing party. That there is an especial role to be played by employees in the enforcement of health and safety standards has now become the conventional wisdom. The internal responsibility system urged by the Ham Commission in its report on *The Health and Safety of Workers in Mines*, [1976] has now found legislative expression in the *Occupational Health and Safety Act*, RSO 1980 c. 321, which provides *passim* for the active participation of employees in ensuring compliance with legislatively imposed health and safety standards.

21. Turning now to the first of the benchmark situations, that where a direct influence upon the employment relationship is asserted, the Board looks to effective control or authority over other persons as the criterion against which to measure the job functions exercised. Here such control and authority is said to be exercised both over employees within the respondent's own workforce, and over those in the workforces of the contractors engaged on the construction projects. As to these latter, such control and authority is intimately associated with the enforcement of the construction and health and safety standards which we have just reviewed. There is no direct supervision over the work of the construction crews, nor is there any authority exercised which would affect their employment status with the respective contractors for whom they work. All witnesses agreed that any perceived impropriety on the part of a crew worker, whether in terms of conduct or work method, would be brought to the attention of the contractor's foreman or superintendent on the site for corrective action. There was no instance indicated of any discipline whatsoever, much less discharge being meted out by construction inspectors vis a vis such crew members. The purported authority to order the removal of a worker from the jobsite, found in the construction contract, has likewise never been exercised. The Board is satisfied that the construction inspectors exercise no effective control or authority effecting the employment relationship over persons in the

employ of the contractors engaged by the respondent in the construction of its gas distribution systems.

22. With respect to its own workforce there is evidence of some degree of control and authority by senior construction inspectors over junior construction inspectors generally, and each other in certain circumstances. It has already been indicated that several inspectors may be assigned to any particular project. The expertise of the inspectors differs. Some are particularly skilled in lorrying and backfill, others in welding, others in trenching and chaining. All of this work may be carried on simultaneously at different locations within the project site. All of it requires on-going and constant inspection. The normal practice is for the respondent to appoint one senior inspector on the project to be "in charge". This function may rotate from project to project and from season to season and any particular inspector may be so assigned on one project or portion thereof, but not on another. The principal function of the senior inspector in charge is to assign particular work to the body of inspectors working on site and to co-ordinate their activities. The chief engineer referred to such a senior inspector as "project manager". That is not a title or designation formally used in the respondent's organizational structure nor is it a description which corresponds to the statutory term "managerial functions". For the role of such a senior inspector is nothing other than that of co-ordination of the work of the whole. And as we have seen, co-ordination in such circumstances is not equivalent to management. The particular project must be completed according to the contractual terms. To do so requires some planning and a great deal of co-ordination of the activities of many different persons, and that co-ordination and planning is best ensured by entrusting it to a single individual at any particular time. The entrusting of such a function does not however entail, on the evidence before us, the granting of any functions which could be described as managerial in nature.

23. In addition, senior construction inspectors have a role to play in the training of junior construction inspectors. This is to be expected and as the Board indicated in *Caledon Hydro-Electric Commission, supra*:

Persons who exercise craft skills which have been acquired through years of training or experience will necessarily exercise a considerable influence over less experienced "journeymen" apprentices, and associated non-craft employees ... The important question is whether the individual can affect the economic lives of other employees so that he is put in a position that creates a conflict of interest incompatible with membership in the bargaining unit. (para. 8)

Here, the Board does not think that the relationship between senior and junior construction inspectors creates such a conflict of interest. It is true that the opinion of the senior inspector is asked as to the work of the junior and this is freely given -- but not in any formal manner, i.e. there are no written assessments required. Because the size of the inspectorate required in any one construction season may vary, those assessments are taken into account by the chief engineer and other senior inspection personnel as they look for additional inspectors from year to year. As well their opinions are sought as to other potential candidates of whom they may be aware from their work in the field. However, in his testimony the chief engineer made it clear that hiring decisions are his and not those of the senior inspectors. Their opinion is valuable, but it cannot be characterized as an effective recommendation.

24. No witness purported to exercise any disciplinary authority over junior construction inspectors, much less the right to fire. Indeed, the chief engineer testified that in the years of his association with the respondent no inspector had ever been fired. Much was made of the purported authority of senior inspectors to lay off employees. But this is not the case. It is true, that as the project progresses, the number of inspectors required will diminish. Some must be laid off -- and the opinion of the senior inspector in charge is routinely sought. But the chief engineer, among

others, testified that seniority plays a significant, if not dominant role in this determination. True other factors such as particular expertise and requirements of the job are also considered, but in the final analysis, ultimate decisions are always taken by the managerial personnel at the North Bay Office. Although the Board recognizes that in this one function the evidence points to a recommendation which could be said to be effective, it is of the view that set within the overall structure of the respondent's construction project operations it cannot be said to be such as to convert the functions of the senior construction inspectors into those properly classified as managerial. Thus, there is no jurisdiction vested in the inspectors to grant time off or overtime in any formal sense. Rather, the several inspectors on a project co-operate with one another and cover, one for the other, when there is a need to leave the jobsite. Payment of overtime is regulated by company practice and procedure, which, put shortly, requires that an inspector remain on site for whatever time the crew to which he has been assigned is engaged in construction work. One witness testified that he was severely upbraided for having once allowed an employee time off and advised not to do so in the future. As to other employees of the respondent with whom the construction inspectors may come into contact -- tapmen and measurement men, there is no evidence of any responsibilities which could be said to influence the employment relationship outside of those functions associated with enforcement of construction and health and safety standards.

25. From the foregoing, the Board concludes that in this second benchmark situation, where there is asserted a direct influence upon the employment relationship, it cannot be said that the construction inspectors, whether senior or junior, are exercising managerial functions within the meaning of the Act, and it has reached this conclusion applying the criterion of effective control and authority. The Board is of the view that in many respects, the organization of the respondent's enterprise during the construction phase reflects what was described in *Spar Aerospace Products Ltd.*, [1979] OLRB Rep. July 700 as a "matrix" form of organization in which "decision making has been diffused to the extent that important recommendations both as to policy and to personnel originate at the level of group leader, and below, as these persons engage their professional colleagues in response to their scientific and engineering assignments." (para 14). Here, as there, the Board concludes that within the professional and technical setting of the respondent's enterprise the functions performed by the senior and junior construction inspectors cannot be characterized as managerial.

26. One further related issue as to a perceived conflict of interest within the context of this application was raised although not vigorously argued, and no reference to authority was made. This is the question of whether, in light of the fact that the applicant holds the bargaining rights for certain employees of the contractors engaged by the respondent on its construction projects, and indeed could, although the evidence is not here clear, hold similar bargaining rights for employees of the respondent itself, could not a conflict of interest arise which would make the grant of a certificate to the applicant inconsistent with the objectives of the statute? As the matter was not forcefully put before us, the Board does not here intend an exhaustive treatment of the issue. It notes, however, the absolute terms in which section 3 of the Act is formulated, vesting in the employee the freedom "to join a trade union of *his own choice*". Where limitations on that freedom were intended, they have been clearly indicated elsewhere, e.g. the provisions governing security guards found at section 12. Whether the Board has jurisdiction to further fetter that freedom may be questioned in light of the decision of the Court of Appeal in *CSAO National, Inc. v. Oakville Trafalgar Memorial Hospital Association and Ontario Labour Relations Board* [1972], 26 DLR (3d) 63. See as well *N. B. Teachers Federation v. Province of New Brunswick* [1970], 3 NBR (2d) 189 (C.A.). Indeed, in the case of security guards such a perceived conflict of interest is not shared by legislators in other jurisdictions. See *Fraser Inc.* [1985], 11 CLRBR (NS) 179, a decision of the New Brunswick Industrial Relations Board in which the law is canvassed. If the Board had jurisdiction to fetter the section 3 freedom as asserted, then it could only be upon the basis of a real and

serious conflict between the functions and duties owed by the subject employees to their employer and their expected loyalty to fellow union members in another bargaining unit. The Board sees no such conflict here and, if it possesses the discretion contended for, would not exercise it in favour of the respondent.

27. Accordingly, and in view of its finding that the senior and junior construction inspectors employed by the respondent do not exercise managerial functions, the Board declares them to be employees for whom bargaining rights may be sought under the Act. The Board has already found the bargaining unit sought by agreement of the parties to be one appropriate for collective bargaining. On the basis of all of the material before it, the Board is satisfied that more than 55% of the employees of the respondent who were in the bargaining unit at the time the application was made, were members of the applicant on April 16, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Accordingly, a certificate will issue to the applicant trade union in respect of all senior construction inspectors and junior construction inspectors of the respondent in and out of North Bay, Ontario.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. In making determinations as to the appropriateness, or otherwise, of an individual being included in a bargaining unit the Board has long held, and rightly so in my opinion, that the technical and fiduciary aspects of a job are not of themselves relevant considerations. The Board assumes these aspects will be carried out accurately and faithfully whether or not the incumbent is a member of, or represented by a trade union. Moreover, any abrogation of such responsibilities, whether by negligence or intent, can be dealt with through one or another form of disciplinary action.

2. Thus, for instance, while a cashier is obviously in a position to do financial harm to a business, our assumption is, quite apart from criminal law implications, that an individual will not intentionally cause financial losses to be incurred, but rather that the individual's motivation will be to maximize the profitability of the enterprise so that there will be a larger economic pie to be shared.

3. I interpret the preambular declaration of the Act (it being in the public interest to "further harmonious relations between employers and employees") as recognition on the part of the legislators that these parties do have a common interest in maximizing the economic pie. The harmonious relations envisioned by the legislators include *inter alia* pursuance of that common interest.

4. The parties diverge in their interest over the division of the pie and it is this issue which the Act contemplates being resolved in an orderly fashion through collective bargaining. Despite the fact that the resolution of this issue often dominates the public perception of collective bargaining, in my view the Board should not perceive its responsibility as presiding over an exercise of choosing up sides for a prospective conflict and I therefore respectfully choose to disassociate myself from the *obiter dicta* at paragraph 4 of the majority decision.

5. As I understand the nature of the work performed by the inspectors, practical considerations have prompted the employer to empower the inspectors to determine their own overtime albeit within specified general parameters. This authority and responsibility is quite unlike that of the example of a cashier, as noted earlier, in that it effectively goes to the issue of the division of the pie in terms of total remuneration.

6. In my view, such authority can only be reposed in managerial personnel without creating the basis for a potentially serious conflict. With the inspectors included in a bargaining unit it may be necessary, if possible, to move this authority to a level higher in the organizational structure. Because I question efficacy of doing so, and because their other responsibilities are at least arguably managerial in nature, I would have excluded the inspectors under the provisions of section 1(3)(b) of the Act.

2381-86-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, on its own behalf and on behalf of Local Union 463, Applicant v. **Ontario Hydro** and The Electrical Power Systems Construction Association, Respondents

Construction Industry Grievance - Respondent refusing to rehire grievor, although properly referred according to the hiring hall procedure, on basis that the grievor had refused to pay money claimed by the respondent for lost equipment - Employer having right to reject persons who in the employer's opinion are not competent or qualified - Employer not entitled to reject based upon any explicit right in the collective agreement because non-payment of money not related to competency - Implicit residual discretion to reject cannot stand in the face of the explicit clauses in the agreement - Even if implied right to reject, employer's rejection unreasonably exercised - Compensation beyond amount owed by grievor directed

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *Paul Timmins* and *Brian Christie* for the applicant; *C. C. White*, *Bruce Young* and *Jim Ella* for the respondents.

DECISION OF VICE-CHAIR ROBERT J. HERMAN AND BOARD MEMBER H. KOBRYN;
June 29, 1987

1. This is an arbitration under section 124 of the *Labour Relations Act*, grieving a breach of the agreement in the respondent Ontario Hydro's refusal to rehire the grievor, though properly referred.

2. The grievor, Fred Meens, an employee represented by the applicant and covered by the applicable collective agreement, worked for Ontario Hydro (hereinafter also referred to as "the respondent") from December 3rd, 1985 until April 25th, 1986. On January 31, 1986, Meens reported his welding helmet missing. He had set it down to go for more rods, and when he returned it was gone. The helmet was replaced by Ontario Hydro without charging Meens for reimbursement. On March 10, 1986, Meens reported a second item of equipment missing, a pair of fitters gloves, again because he had set them down and left them unattended, and again Ontario Hydro did not charge him for having to replace those gloves. On April 25, 1986, Meens reported missing his welding jacket, another piece of equipment he had laid down and left unattended. As with the previous missing equipment instances, Meens filled out a missing equipment report, and submitted it to the respondent. Hydro investigated all the circumstances, but by the time it could respond, this time seeking reimbursement from Meens, the grievor had terminated his employment. The next working day following April 25th, when he reported the jacket missing, Meens

phoned the respondent to quit, as he preferred to work on a project in the Kingston area where he lived.

3. On June 9th, the respondent sent a letter and invoice to the grievor, indicating it was seeking reimbursement of the \$46.00 because of the lost welding jacket and indicating that failure to reimburse pursuant to its request might result in the respondent's refusing to rehire the grievor for any subsequent projects. On October 16th, 1986, the grievor was referred to a job by the applicant at the Darlington Plant. The respondent refused to rehire the grievor, though properly referred according to the hiring hall procedure and the collective agreement procedures for referrals, on the basis that the grievor had refused to pay the \$46.00 claimed by the respondent. The respondent concedes that the grievor was a competent, fully qualified employee, and the sole reason for refusing to rehire him pursuant to the referral was the non-payment of the \$46.00 in question. The respondent did not suggest that the history of lost equipment in any way rendered Meens an unsuitable employee.

4. The issue before the Board is whether Ontario Hydro's refusal to hire the grievor in these circumstances constituted a breach of the collective agreement. The applicable provisions of the collective agreement read as follows:

8.6 The employment of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:

- (a) The Association office will request the appropriate Local Union office for tradesmen and apprentices required. The Union will furnish competent workmen on request. The Employer shall have the right to determine competency and qualifications and to reject any new applicant and to discharge and discipline any employee for just and sufficient cause.

The Employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.

- (b) The Union members who are resident in the designated geographic area will be referred by the Union for employment through the Association office. As much as their out-of-work list will permit, the Union will supply members on a fan out basis from the project or work location.

The Employer will either hire such persons or substantiate their reasons in writing for not doing so.

- (c) When the supply of tradesmen and apprentices within the geographic area of the project has been exhausted and additional tradesmen and apprentices are required, the Association will contact the International Representative for the trade concerned in order to determine whether Union tradesmen and apprentices are available outside of the geographic area. The United Association will co-operate in providing employment to such Union tradesmen and apprentices on the basis that they be supplied from the nearest location where they are available.

- (d) The Employer agrees to hire and employ only members of the United Association when available on all work within the jurisdiction of the Union. Such employees as a condition of their employment shall continue to maintain their membership in the United Association. No one will be employed unless they are in possession of a referral slip from the Local Union office. All employees in possession of a referral slip from the Local Union shall register with the Association office on site prior to commencing work.

Notwithstanding Article 7, section 7.1 if, upon request, the Local Union or

the United Association is unable, within three (3) full working days, to supply journeymen, including journeymen with special skills, the Association may secure journeyman from other available sources.

15.2 PAY PROCEDURE ON TERMINATION

...

- (a) An employee who voluntarily terminates his employment will be provided his final pay on the next regular pay day.

...

- (d) If, at the time of termination, an Employer is not prepared to consider an employee eligible for rehire, the employee will be notified in writing and a copy of said notification will be forwarded to the Accredited Union Representative.

Article 31

WELDING TESTS

- 31.1 / On hire welders must possess the qualifications and class of welding ticket specified by the Employer. It will be at the Employer's discretion whether a welder who does not possess the qualifications and class of welding ticket specified will be hired.

Article 33

PROTECTIVE CLOTHING AND EQUIPMENT

...

- 33.3 / The protective clothing and equipment covered in sections 33.1 and 33.2 that is provided by the Employer will be charged out to the employee and the employee shall be responsible for the return of such clothing and equipment to his Employer.

5. Counsel for the applicant began his submissions by emphasizing that the respondent did not object to rehiring the grievor because of any concern over ability to do the work. The sole reason was the outstanding invoice for \$46.00 and Meens' refusal to pay that amount. Counsel referred to Article 8.6(a) as being the critical Article before the Board, and particularly the following sentence from that Article:

... The Employer shall have the right to determine competency and qualifications and to reject any new applicant and to discharge and discipline any employee for just and sufficient cause.

The applicant submits that this clause gives the respondent employer the right to determine "competency and qualifications", where those terms refer to trade qualifications or ability to perform the job in question. the word "qualifications" cannot reasonably be construed to include reference to the fact that the grievor might owe money to the respondent. Counsel submitted that the right of the employer "to reject any new applicant" must be read along with the preceding phrase that the employer has the right "to determine competency and qualifications". The right that is given by this clause of the collective agreement is the right of the employer to determine competency and

qualifications, and where the employer feels that a referred employee is lacking thereof, the employer has the right to reject that employee, provided he or she is a new applicant. The word "new" in that phrase, in order to give it any meaning, must mean that the phrase confers on the employer the right to reject employees who have been referred for the first time; in other words, employees who are, for purposes of this collective agreement and this employer, "new" applicants. If this clause gave the employer the right to reject any applicant, whether a first time or former employee, then the phrase would have read "to reject any applicant". Inserting the word 'new' in that phrase must mean that any employer right to reject is limited to employees who are applying or are referred to work for the respondent for the first time.

6. Counsel for the applicant further submitted that this interpretation of "reject any new applicant", (that is, that the employer right to reject was limited to applicants who were applying or referred to the employer for the first time) in turn cast light upon the correct interpretation of the entire clause, indicating that the basis upon which an employer could reject a new applicant was on grounds of competency or qualifications. The employer was given the right to determine competency and qualifications and where a new applicant was felt deficient in either of these respects by the employer, the employer was further given the right to reject that new applicant (provided the reasons for so rejecting were given in writing pursuant to Article 8.6(b)). In the instant case, counsel submitted that the grievor was not a "new applicant", as the grievor had worked for this employer up to April 25, 1986 and accordingly, the employer could not rely on any right to reject, however circumscribed, contained in the phrase "to reject any new applicant". Subsection (b) of Article 8.6 did not create a substantive right of the employer to reject, where it indicated that the employer "will either hire such persons or substantiate the reasons in writing for not doing so", but rather established the procedural requirement that reasons be provided in writing where the employer exercised its right to reject under either subsection (a) or (b). Neither (a) nor (b) gave the employer, in the circumstances, a right not to rehire an employee properly referred by the union. Subsection (d) of Article 8.6 made clear that all employees were to be referred by the applicant through the union hiring hall and only where the applicant could not provide sufficient (and competent and qualified) employees within three full working days, was the respondent entitled to seek such journeymen elsewhere.

7. The applicant also referred to Articles 31 and 15.2(d). Article 31 gave the respondent a specific discretion whether to hire welders without certain qualifications, emphasizing that where the parties intended that the respondent should have a discretion not to hire those referred by the union, those rights were specifically delineated and described in the collective agreement. Where such discretion was not explicitly given, in the applicant's submission the respondent did not have any such discretion. Article 15.2(d), as with Article 8.6(b), was procedural in nature only, and did not give the employer a right not to rehire, but rather required notice in writing, either at the time of refusal to hire (as per Article 8.6(b)) or at the time of termination (as per Article 15.2(d)), setting out the reasons why the respondent was refusing to employ a given employee. Such procedural requirements were necessary in order to give the employee or the union an opportunity to know the case against the particular employee, and an opportunity to grieve should the employee or union so desire. No substantive rights were conferred upon the respondent by these two articles.

8. In the alternative, the union submitted that if the Board were to find that the employer had a discretion in these circumstances, pursuant to Article 8.6(a) of the collective agreement, to refuse to rehire the grievor, that discretion must be exercised in accordance with the standard set out by the Board in *Ontario Hydro*, [1983] OLRB Rep. Jan. 99. That test establishes that an employer in rejecting a person properly referred, where undelineated discretion does reside with the employer to do so, can only reject such persons if the employer "believes [them] to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith, and with-

out discrimination.”. In these circumstances, the applicant submits that it is not reasonable for an employee to be rejected, though properly referred, competent, and completely capable of doing the job, for the sole reason that the respondent maintains, without any independent adjudication of the matter, that the employee referred owes it \$46.00.

9. Finally, the applicant referred to the *Employment Standards Act* and the prior Board decision in *Ontario Hydro*, [1985] OLRB Rep. June 896, for the proposition that to allow the employer to refuse to hire in these circumstances would contravene the spirit, intent and policy contained in sections 7 and 8, of the *Employment Standards Act* and section 15 of Regulation 285 passed thereunder. Those sections read as follows:

7.(1) An employer shall pay to an employee all wages to which an employee is entitled under,

(a) an employment standard; or

(b) a right, benefit, term or condition of employment under a contract of employment, oral or written, express or implied, that prevails over an employment standard,

in cash or by cheque.

(2) All wages shall be paid at the work place of the employee, or at a place agreed upon by the employer and the employee.

(3) All wages due and owing to an employee shall be paid by an employer on the regular pay day of the employee as established by the practice of the employer.

(4) Any payment to which an employee is entitled upon termination of employment shall be paid by the employer to the employee not later than seven days after termination of employment.

8. Except as permitted by the regulations, no employer shall claim a set-off against wages, make a claim against wages for liquidated or unliquidated damages or retain, cause to be returned to himself, or accept, directly or indirectly, any wages payable to an employee.

DEDUCTIONS, ETCETERA, FROM WAGES

15.-(1) Notwithstanding section 8 of the Act, an employer may set off against, deduct from, claim or make a claim against or retain or accept the wages of an employee where,

(a) a statute so provides;

(b) an order or judgment or a court so requires; or

(c) subject to subsection (2), a written authorization of the employee so permits or directs.

(2) No written authorization of an employee shall entitle an employer to set off against, deduct from, retain, claim or accept wages for faulty workmanship, or for cash shortages or loss of property of the employer where a person other than the employee has access to the cash or property.

(3) Where an employee has been given or paid a vacation with pay or payment for vacation in excess of the requirements of Part VIII of the Act, no employer shall set off or deduct such excess against or from any vacation with pay, pay for vacation, or payment under section 31 of the Act.

10. Although the applicant concedes that the union referral and hiring hall mechanism does not fit literally under the provisions of the *Employment Standards Act* set out above, the applicant

argues that the policy considerations contained therein, and specifically as contained in sections 8 and 15, strongly mitigate against allowing the employer to refuse to hire an employee because of money allegedly owed to the employer, even where such sums arose out of the employment context. Counsel pointed out that if the grievor had remained employed with the respondent, the respondent could not have deducted the \$46.00 it claimed owing from the grievor's pay cheque, as such would clearly be against the provisions of the *Employment Standards Act*. The *Ontario Hydro* case (1985) stands for exactly this proposition. What the respondent could have done in such circumstances would be to discipline the grievor, for example for negligence, whereupon the union could grieve the matter and independent adjudication would decide which party was correct, or alternatively, the employer, as with other creditors, could resort to the civil courts for a determination of whether the \$46.00 was owing. Either scenario would involve the employer justifying its conclusion, and an independent arbitration or adjudication deciding on the merits of the dispute. The *Employment Standards Act* provisions in question were designed specifically to prevent an employer using its position of power to unilaterally determine the liability of employees and enforce payment, without any prior resort to independent adjudication of the merits. In the instant case, the employer is trying to do indirectly, because of the special features of the union hiring hall, what it could not do directly as proscribed by the *Employment Standards Act*.

11. In reply, counsel for the respondent agreed that the crux of the issue is the correct interpretation of Article 8.06(a) of the agreement. Counsel submits that subsection enshrines three distinct rights reserved or given to the respondent employer. When one analyzes the critical sentence, "the employer shall have the right to determine competency and qualifications and to reject any new applicant and to discharge and discipline any employee for just and sufficient cause", it is apparent that three distinct, independent rights are established. The "right to reject" does not flow from the prior established "right to determine" competency and qualifications. The disjunctive "and" used between "qualifications" and "to reject", and in turn between "new applicant" and "to discharge", indicate that three separate independent rights are relegated to the respondent. If it were otherwise, there would be no point to including the phrase "to reject any new applicant", for if the employer had the right to determine competency and qualifications, and the right to reject was limited to matters of competency and qualifications, then the employer would have the same right if the clause read The employer shall have "the right to determine competency and qualifications and to discharge and discipline any employee for just and sufficient cause". The inclusion of the specific right "to reject any new applicant", must indicate that there is a right to reject an applicant for reasons other than those of competency and qualifications. Further support for this interpretation is grounded on the inclusion in the clause of the right "to discharge and discipline" for just and sufficient cause. Counsel for the respondent noted that the right "to discharge and discipline" has nothing to do with hiring, matters covered in the earlier part of the same sentence, thus indicating that different subject matters, which are not logically connected, are included within the same clause in the collective agreement.

12. Counsel for the respondent further submitted that the phrase "new applicant" does not mean that the employer cannot reject a rehire, as in the employer's submission each applicant, referred by the union, is in effect a "new" hire, notwithstanding that they might have worked for the employer previously.

13. Alternatively, if the employer does not have an untrammelled right to reject an applicant, it does have a right to reject employees referred by the union for reasons that are wider than competence or qualifications. Specifically, the Board must imply a common sense interpretation to the collective agreement, and ensure that the employer is not required to hire employees referred who are manifestly unsuitable for employment, for example, because they have been discharged for cause the previous day. In this respect, as did counsel for the applicant, the respondent referred

the Board to *Ontario Hydro* (1983, *supra*). The issue therefore becomes whether the employer acted reasonably in refusing to rehire the grievor because of his refusal to pay the \$46.00 for the lost welding vest. Counsel noted that this was the third item of lost equipment within a relatively short time, and the employer had not sought redress from the grievor for the prior two losses. However, Article 33.3 of the collective agreement made clear that employees were responsible for the equipment provided by the employer, and the grievor ought to have been more careful with the equipment, given his two prior losses in similar circumstances. Counsel submitted that the employer had acted reasonably, in that it had given the benefit of the doubt to the grievor on the two previous occasions, but on the third occasion, and in a manner consistent with its own policy guidelines for dealing with such losses, it had decided that the grievor should be responsible for the most recent loss. There was nothing in the *Employment Standards Act* restricting the employer in this regard, as the clear wording of sections 7 and 8 of that Act and section 15 of the regulations made clear that those provisions and protections were applicable only to employees owed wages by an employer.

14. Finally, the respondent argued that if the Board should uphold the grievance, either on the grounds that there was no unfettered right of the respondent to reject the grievor, or alternatively the respondent had acted unreasonably in rejecting the rehire of the grievor in the circumstances, that the only relief provided ought to be a declaration, rather than damages. The respondent argued that the applicant or the grievor could have mitigated their damages, paid the \$46.00 owing, and subsequently grieved, without escalating the dispute to a question of lost wages or compensation for the time during which the grievor was unemployed. In effect, counsel argued that the scenario was a variation of the “work now, grieve later” principle and ought to be applied in these circumstances. Another reasonable and viable alternative for resolving this matter was available to the employee, by payment of the \$46.00 and grievance, rather than refusal to pay, refusal to rehire as previously warned, and escalating compensation because the employee in question remained out of work.

15. We agree with counsel for both parties that the interpretive crux in this case is the interpretation to be given to Article 8.6(a) of the collective agreement, and more particularly, the sentence contained therein that gives the employer “the right to determine competency and qualifications and to reject any new applicant and to discharge and discipline any employee for just and sufficient cause.” We assess these phrases and the collective agreement in the context of the construction industry and the hiring hall referral system. In this regard we might usefully refer to parts of the *Ontario Hydro* decision (1983, *supra*). The analysis and comments set out from that decision appear to us still applicable and we adopt them. In that decision the Board stated as follows:

29. Section 701(A)(i) does not specifically state that the employer will hire any particular member of I.B.E.W. but, on the other hand, the commitment to request the tradesmen required from the trade union can reasonably be construed as a commitment to hire those tradesmen referred. It could also, but less reasonably we think, be construed as agreeing that the local union act on behalf of the employer in hiring the available tradesmen. On the other hand, the respondent asserts that the right to hire is a significant management right which should be fettered [sic] by clear intent and custom. Against the submission, it is useful to consider the remainder of the language used in paragraph (ii). Section 701(A)(ii) goes on to state that the employer shall be afforded “the right” to employ certified tradesmen as are available. [sic] “[i]f the local union is unable to furnish certified local union or travel card members to the employer within three (3) working days of the time” it receives a request from the employer. In our view, it is more difficult to infer from this language the unfettered right of the employer to refuse to hire those certified local union tradesmen referred within the three days stipulated. The sentence positively enshrines a right to employ certified tradesmen as are available *after* the three days have elapsed suggesting that such a right does not exist prior to the expiration of the three days. Moreover, an unfettered discretion to hire members referred to the employer could substantially undermine the hiring hall procedure enshrined in this section. An unreviewable discre-

tion to reject in combination with the three day time limit would grant the respondent access to non-member forces any time it wished. The other relevant portion of section 701(A)(ii) is the commitment that travel card members and permit holders may be replaced by local union members after three working days' notice to the employer provided the tradesman to be replaced has worked a minimum of one week. This commitment, while not using the imperative language "shall", appears to place the discretion of replacement in the local union's hands provided three days' notice is given to the employer. If the employer retained the unfettered discretion to reject in this instance there would be little need to stipulate a notice period and create the proviso that the tradesmen to be replaced must have worked a minimum of one week. It is also relevant that the collective agreement does not specifically embrace a management rights clause that deals directly with the act of hiring.

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31. One response to the first issue (i.e. the extent of employer discretion) might be to require a specific and unequivocal encroachment to the management right to hire before being satisfied that the employer has given up this important responsibility. This seems to have been the approach in *Re International Union of Operating Engineers, Local 944 and Labatts Ontario Breweries Limited* (1964), 15 L.A.C. 351 (Reville) and in *Re Operating Engineers and Molson Brewery (Ontario) Limited* (1958), 9 L.A.C. 147 (Cross). We note that in *Molsons Brewery Limited* case the collective agreement provided that "if within five days the union could not supply applicants who were 'satisfactory to the company' the company could then arrange to hire men elsewhere". The Board concluded that the phrase "satisfactory to the company" clearly implied the right of the company to exercise its own judgment in considering whether to take on the persons referred to it by the trade union. In the *Labatts Ontario Breweries Limited* case the agreement provided that "any employee so furnished would be fit and suitable to perform the services required". From that language the board of arbitration concluded that the employer retained the right to determine an employee's qualifications, provided it acted judicially and bona fide. We also observe that neither case pertained to the construction industry.

32. The other approach, and the one we prefer, is to recognize that this collective agreement was negotiated in the context of the construction industry and that the words of the collective agreement in issue pertain to one of the hallmarks of the construction industry, the hiring hall. The nature of a hiring hall is to a large degree a function of two labour relations realities in the construction industry. The first is the fact that this collective agreement and others in the construction industry generally pertain to "certified tradesmen or journeymen". The word "journeymen" is said to have originated in the railroad industry where a journeyman was considered a totally competent craftsman who could take his tools and apprentice and travel to remote parts of a railroad to perform his work as a skilled craftsman essentially on an unsupervised basis. A "journeyman" or "tradesman" need not be described as a "skilled journeyman" or "skilled tradesman" because the word journeyman or tradesman already denotes the highest level of skill in a trade. In short, the term journeyman or tradesman refers to a person who can work with little or no supervision and who represents the highest level of proficiency in a craft. See *Swinerton and Walberg Company* (1977), 68 L.A.C. 940 (Schedler). The notion of "certification" pursuant to legislation requiring the training and certification of tradesmen is today a further guarantee of proficiency. Thus, persons who constitute certified tradesmen or journeymen and who are referred to an employer by way of a hiring hall provision cannot be considered untested and untried potential hires "from the street" as in a manufacturing or service context. Because journeymen and tradesmen are expected to have a minimum level of proficiency, an inference that the employer has agreed to fetter its hiring discretion, or subject it to arbitral review, is not prima facie an unreasonable conclusion.

33. The second point giving rise to the nature of a hiring hall is the peculiar relationship between employer and employees in the construction industry as was discussed in the case of *R M. Hardy and Associated Limited and Teamsters, Local Union 213*, [1977] 2 Can. L.R.B.R. 357 where the chairman, Professor P. C. Weiler, observed the following:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who

employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry - stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. *In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force.* Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

[our emphasis]

34. It is against the background of these observations that one must consider the various cases dealing with the effect of hiring hall provisions on employment status. It has been clearly established that persons in a hiring hall and not yet in the active employ of an employer can seek relief under a collective agreement and be awarded damages for the breach of a union hiring hall provision. See *Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1975] 57 D.L.R. (3d) 199 and *McKenna Brothers Limited and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273 (Shime). See also *Eton Construction Limited*, [1981] OLRB Rep. July 872. It has also been held that the refusal of a local union to refer tradesmen can amount to an unlawful strike of such tradesmen even though they are not in the active employ of the employer in question. See *Local 273, International Longshoremen's Association v. Maritime Employers Association*, [1979] 1 F.C.R. 120. On the other hand, we note the apparent need of the Legislature to enact section 69 of the Act in order to create a duty of fair representation for those in the hiring hall but not yet employees within the meaning of section 68. But whatever the legal significance of section 69, the court cases do suggest that in the construction industry and in like industries, there is in law, and without specific contractual wording to the contrary, a very close relationship between being in a hiring hall and having employment status. Precisely, [sic] how close will depend on the circumstances of any particular case.

35. From this perspective, therefore, it is not surprising to learn that in those arbitration cases considering the refusal to hire a referral in the construction industry an unfettered employer discretion to hire has been honoured by a board of arbitration usually in the face of very specific contractual language retaining a discretion to hire or refuse to hire in the employer. In *Re Columbia Bitulithic Limited and International Union of Operating Engineers, Local 115* (1977), 17 L.A.C. (2d) 47 (Chertkow) the union specifically recognized the employer's right to "name - request a former employee". Similarly, in *Re Waffle Electric Limited and International Brotherhood of Electrical Workers, Local 773* (1975), 9 L.A.C. (2d) 334 (Kruger) the contractor was obligated to take the first man on the out-of-work list but "had his choice for the second employee [he wished] to have at that time from the next foremen listed on the out-of-work list". In *Newark Newspaper Publishers Association* (1963), 43 L.A. 245 (Schmertz) the employer retained "the right to reject any job applicant referred to it by the union". In the *Board of Education for the City of Toronto and Toronto-Central Ontario Building and Construction Trades Council* (1982), March 30th, 1982 (H.D. Brown) the contract acknowledged that "the employees supplied by the union who, in the opinion of the board, are not suitable or qualified may not be hired". Similarly, in *Alyeska Pipeline Service Company* (1981), 76 L.A. 172 (Eaton) the contractor retained "the right to reject any job applicant referred by the union". Parallel language existed in the contracts in *Potashnyck Construction Company* (1981), 77 L.A. 893 (Richardson)

and *Barnard and Birk Inc.* (1980), 74 L.A. 550 (Taylor). Cases where specific language retaining an unfettered right to hire did not exist and where arbitral review took place are: *Re International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Applied Insulation Company Limited* (1964), 15 L.A.C. 238 (Reville); *Newark Newspaper Publishers Association* (1963), 43 L.A. 245 (Schmertz); and *Pacific Maritime Association* (1978), 70 L.A. 422 (Hoffman). Also of relevance in this particular case is the fact that the prior collective agreement between the parties set out above clearly acknowledged in section 10.2 the discretion in the employer to re-employ former employees and the "name hire" system then in operation was specifically embodied in a letter dated December 5th, 1972 appended to that agreement. The collective agreement between the parties that is in issue before this Board contains no such specific language and contains no clear acknowledgement of a discretion in the employer to hire or reject those certified tradesmen referred to it. Accordingly, on the wording of this collective agreement and construing it in light of construction industry practices, we have come to the conclusion that the employer does not have an unbridled right of rejection in dealing with certified tradesmen referred to it pursuant to section 701. It has given up the broad discretion it might otherwise have had in agreeing to this particular hiring hall provision.

16. Returning to the collective agreement before us, the difficulty in interpreting Article 8.6(a) in the instant case is that either interpretation urged upon the Board would arguably render redundant parts of the sentence in question. Were we to accept the applicant's submission that the right "to reject any new applicant" is limited to grounds of competency and qualifications, then it is not entirely clear why the phrase "to reject any new applicant" was included in that sentence. Absent that phrase, the employer would presumably, though implicitly, have the right to reject an applicant whom the employer had determined was incompetent or unqualified, and the addition of that phrase would not give any additional right to the employer. If the Board accepts the employer's submission, that the right to reject is unfettered and applies to all persons referred to it for work, then it is difficult to see what meaning the Board ought to give to the phrase "new applicant", and more particularly to the word "new" in that phrase, since that word would be completely redundant if the phrase applies to all people referred to work, whether they are rehires or employees who have never before worked for the respondent.

17. We view as more reasonable, and more consistent with the hiring hall scheme and the other provisions of this agreement, an interpretation of the phrase "to reject any new applicant" as giving the employer the right to reject workers who are referred to it for the first time. The explicit wording of this phrase, and particularly the word "new", must limit the employer's right to reject to those employees or individuals referred to it for the first time. To accede to the employer's argument, and read this phrase as giving the employer an explicit right to reject any applicant referred to it, whether for the first time or a rehire, would be to render completely redundant the word "new" in that phrase. Accordingly, the employer can only found a right to reject, based on this phrase, in circumstances where an employee is referred to it for the first time. By common ground Meens was not a "new applicant", and it therefore follows that the employer cannot justify its rejection of him on the authority of the phrase "to reject any new applicant". Parenthetically we note that there was neither evidence nor submissions before the Board indicating that the grievor might be a "new applicant", or alternatively, describing the practice of the parties and how they might have considered which employees might be "new applicants". In short, there was nothing to suggest that Meens qualified as a new applicant; rather, the employer argued that the phrase "new applicant" did not restrict the right to reject to new applicants but applied equally to all applicants.

18. The union submitted that the "right to determine competency and qualifications" in Article 8.6(a) indicated that the right to reject new applicants must only be exercised for such reasons. We do not find it necessary, or appropriate, for us to comment upon the basis on which the employer might reject new applicants, whether solely on the grounds of competency or qualifications or for other reasons, as in our view the employer cannot in the circumstances before us rely

upon its right “to reject any new applicant”. Accordingly we need not consider how the employer might exercise that right in circumstances involving a “new” applicant.

19. Although the employer was not entitled to reject Meens based upon its right to “reject any new applicant”, we must next ask ourselves whether it was entitled to reject Meens based upon its “right to determine competency and qualifications” as set out in Article 8.6(a). Again, given the language of the clause, the other provisions of this agreement, and the context of the hiring hall scheme, we read this phrase as giving the employer the right to reject applicants, including rehires such as Meens, who in the employer’s opinion are not competent or are incapable of performing the job in question. Where an employee had previously worked for the respondent, and had been both competent and qualified to do the work, the employer would not have the right under this collective agreement to reject that employee when referred to a further job, at least unless some intervening event had brought into question the competence or qualifications of the employee in question. Article 15.2(d) deals specifically with prior employees (including those, as in the instant case, who voluntarily terminate their employment, cf. Article 15.2(a) and (d)) who the respondent found to be incompetent or unsuitable, and together with 8.6(a), protects the employer from rehiring employees lacking the requisite ability. Once the employer has employed individuals, and assuming those employees have properly performed the work and have demonstrated their competency and qualifications, the employer must rehire such employees when referred to it, properly, by the applicant in the future. The right to reject is specifically limited by the language of 8.6(a), with respect to applicants other than new applicants, to grounds of competency and qualifications. Article 8.6(d) in effect requires the employer to hire proper referrals, albeit subject to its express right to reject as contained in subsection (a).

20. Thus, although an employee is not a new applicant and has previously worked for the employer, the employer still retains the right to reject that employee when referred to it, provided it does so solely on the grounds of competency or qualifications. If the respondent’s concerns over the competency or qualifications of the referred employee arise from prior work, then the respondent is required by Article 15.2(d) to indicate, at the time of termination, that the employee may not be rehired and to indicate in writing the reasons thereof. Article 15.2(d) only requires the employer to indicate its decision not to rehire if, at the time of termination, the employer is in a position to make that decision. We do not read the agreement as preventing the employer from relying on matters brought to its attention subsequent to the time of termination, which matters reflect upon the employee’s qualifications or competency to perform the job. In those circumstances, where an employee is referred who had previously worked for the respondent and the respondent had not indicated in writing at the time of termination that it would not rehire the employee (as required by Article 15.2(d)), the respondent could still reject the referred employee, based upon its authority to do so contained in Article 8.6(a) (within the phrase “the employer shall have the right to determine competency and qualifications ...”) provided that its reasons for doing so are related to concerns about competency or qualifications and are based upon matters arising or brought to its attention subsequent to the previous termination.

21. There is no suggestion in the instant case that Meens was not fully competent and qualified to perform the job, nor was there any suggestion that his history of losing equipment, including the most recent loss for which the respondent sought \$46.00 reimbursement, in any way indicated or led to an inference that Meens could not fully and competently perform the job. The only grounds raised for Meens rejection was that he owed the employer \$46.00 and had refused to pay. Whatever “competency and qualifications” might mean in other circumstances, we cannot say the employer in the instant case rejected on grounds of competency or qualifications, the only grounds upon which it was legally entitled to base its rejection. Accordingly, we find that the employer was not entitled to reject Meens based upon any explicit right in the collective agreement.

22. We must next ask ourselves whether we can find in the collective agreement, specifically in light of Article 8.6(a), a right of Hydro to reject based upon an implied residual discretion. We have concluded that any such implicit right cannot stand in the face of the explicit clauses contained in the agreement. In our view, the parties put their minds towards the issue of discretion in rejecting hiring hall referrals and they agreed that the employer was to retain the right to reject "any new applicant", and as we have found, to reject rehires only on grounds of competency or qualifications. The parties specifically considered the rights to reject and decided to constrain them as we have discussed above. To find a residual implicit right in such circumstances would undercut the agreement the parties have themselves reached. Although the agreement does not directly state that the employer can reject referrals only for the reasons delineated and in circumstances therein applicable, when we consider all the relevant provisions of the agreement, including those provisions set out in paragraph 4 *supra*, we are satisfied the parties intended to delineate all those circumstances in which the employer could exercise any right to reject applicants. As we noted in quoting from *Ontario Hydro*, (1983, *supra*):

31. One response to the first issue (i.e. the extent of employer discretion) might be to require a specific and unequivocal encroachment to the management right to hire before being satisfied that the employer has given up this important responsibility. This seems to have been the approach in *Re International Union of Operating Engineers, Local 944 and Labatts Ontario Breweries Limited* (1964), 15 L.A.C. 351 (Reville) and in *Re Operating Engineers and Molson Brewery (Ontario) Limited* (1958), 9 L.A.C. 147 (Cross). We note that in *Molsons Brewery Limited* case the collective agreement provided that "if within five days the union could not supply applicants who were 'satisfactory to the company' the company could then arrange to hire men elsewhere". The Board concluded that the phrase "satisfactory to the company" clearly implied the right of the company to exercise its own judgment in considering whether to take on the persons referred to it by the trade union. In the *Labatts Ontario Breweries Limited* case the agreement provided that "any employee so furnished would be fit and suitable to perform the services required". From that language the board of arbitration concluded that the employer retained the right to determine an employee's qualifications, provided it acted judicially and bona fide. We also observe that neither case pertained to the construction industry.

32. The other approach, and the one we prefer, is to recognize that this collective agreement was negotiated in the context of the construction industry and that the words of the collective agreement in issue pertain to one of the hallmarks of the construction industry, the hiring hall.

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35. From this perspective, therefore, it is not surprising to learn that in those arbitration cases considering the refusal to hire a referral in the construction industry an unfettered employer discretion to hire has been honoured by a board of arbitration usually in the face of very specific contractual language retaining a discretion to hire or refuse to hire in the employer.

Given the hiring hall context, the agreement in question, and the prior decisions of the Board on point, we are satisfied the employer has not retained any residual discretion to reject applicants, other than as is circumscribed (as we have interpreted) in Article 8.6(a) of the agreement.

23. In the alternative, if we are wrong in our view that no residual discretion remains and Hydro did have an implied right to reject, we consider whether Hydro's rejection was reasonably exercised. As the Board stated in *Ontario Hydro*, (1983, *supra*):

36. But does this conclusion mean that the employer is obligated to hire all tradesmen referred regardless of whether or not they are in fact reliable and competent? Indeed, does this conclusion mean that the employer is obligated to re-employ a person it has previously discharged for cause? Clearly, the right of discharge or discipline specifically acknowledged in section 13 of the collective agreement would have little force or effect if the employer was obligated to rehire an employee it had previously discharged. It would therefore be reasonable to infer a right to reject a person previously dismissed by the employer. But must all other tradesmen referred be hired?

What if a referred tradesman is intoxicated or from past experience believed to be unreliable or incompetent notwithstanding his certification? Were we to hold such an obligation existed, the employer would be required to employ the individual first and then immediately terminate on the basis of the documentation it had before it. Reading the collective agreement as a whole, it is our opinion that in agreeing to Section 701 the parties did not intend such a result. The requirements of section 701 and the acknowledgement of the parties in section 7, paragraph C that reliable and competent union members will be referred and employed are best met by implying a right in the employer to reject persons it believes to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith and without discrimination. We point out that Section 1301 makes clear that "an employee" who has been discharged or otherwise disciplined for cause may take advantage of the "just cause" standard required by that section. On the facts before us, the grievor, Mr. Gilroy, was a tradesman referred for employment but actual employment was not forthcoming. While the parties did not specifically agree to an unbridled right in the employer to reject, they also did not agree to subject rejections to the section 1300 standard of "just cause". Rather, the act of hiring under this construction industry agreement is very similar to the act of promotion in an industrial context. With respect to the latter function, and in order that seniority rights not be capable of unilateral abrogation by an employer, arbitrators have inferred the contractual obligation that management's responsibility to assess employee qualifications be exercised reasonably, in good faith and without discrimination. See particularly *Re United Mine Workers of America, Local 13031 and Canadian Industries Ltd.* (1948), 1 L.A.C. 234 (Roach); *Re Reynolds Aluminum Co. Canada Ltd. and International Molders and Allied Workers Union, Local 28* (1974), 5 L.A.C. (2d) 251 (Schiff); and *Re H.E.P.C. of Ontario and Office and Professional Employees' International Union* (1976), 11 L.A.C. (2d) 36 (Beatty). As the arbitration board in the *Reynolds Aluminum Co. Canada Ltd.* case, *supra*, at page 254-5 put it:

In the ordinary exercise of management functions employers may determine in the first instance what specific qualifications are necessary for a particular job and what relative weight should be given to each of the chosen qualifications. After the employer has made the determination, arbitrators should honour the managerial decisions except in one or both of two circumstances: First, the employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement under the terms of the collective agreement. See *Re United Brewery Workers, Local 173, and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie); *Re Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie); *Re Canadian Trailmobile Ltd. and U.A.W. Local 397* (1973), 2 L.A.C. (2d) 13 (Brown). Secondly, whether or not the employer had acted in good faith, the chosen qualifications bear no reasonable relation to the work to be done. See *Re U.A.W., Local 707, and Ford Motor Co. of Canada Ltd.* (1970), 21 L.A.C. 61 (Weatherill); *Re Oil, Chemical & Atomic Workers, Local 9-14, and Polymer Corp. Ltd.* (1972), 24 L.A.C. 277 (O'Shea).

37. Because a hiring hall provides the same "job security" in the construction industry as seniority does in a non-construction context, the two institutions are equally important and deserving of the same construction and interpretation by arbitrators. An unbridled management discretion to hire in the face of a hiring hall clause such exists in this contract would be as undermining of that provision as would be an unbridled power to review qualifications to seniority rights in the unusual industrial collective agreement. On the other hand, full arbitral review as in discipline cases would not accord with Article 13 and be subject to the concern of excessive arbitral intervention. Accordingly, the approach outlined in *Reynolds Aluminum* is equally applicable to the response of employers to hiring hall referrals without specific wording to the contrary.

38. The issue remaining before us is whether the respondent acted reasonably, in good faith and without discrimination in refusing to hire the grievor who had been referred to it for employment at the various locations noted above. The union bears the onus of proof in establishing that the employer acted improperly. This is not a discipline case. ...

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40. We are not applying a standard of "just cause" for termination but rather, at the highest, a

standard of reasonableness and it is for the applicants to establish that the employer acted unreasonably. ...

24. We adopt that analysis. On this alternative ground, assuming there is no explicit right to reject Meens, we imply a right to reject on the basis set out in the *Ontario Hydro* case, that an employer can reject persons "it believes to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith and without discrimination.". The question for the Board is whether the union has demonstrated that the employer acted unreasonably in refusing to rehire a fully qualified former employee on the grounds that it had concluded that that employee owed it \$46.00 and the employee had refused to pay that amount. There is no dispute that the \$46.00 was not paid, only whether it was owed.

25. It is important to remain cognizant of the context in which the Board in the *Ontario Hydro* case derived such a implied right. Ontario Hydro (the same respondent as before us) had refused to hire an individual referred to it for work at one of its nuclear generating stations on the basis of its concern for security on the site, in light of its awareness that the referred individual had previously been convicted of conspiracy to export arms to Ireland, and had recently been charged with various other criminal offences related to the smuggling of Irish nationals across the American-Canadian border. In applying its standard of reasonableness the Board relied on the public safety and need for security at nuclear facilities as justifying the employer's behaviour. It was apparent that "reasonableness" there depended upon a concern that the referred person could not properly perform the job, as he would be a security risk. Reasonable grounds for refusal therefore related to the ability of the referred person to work on the job site, without unusual safety or security risks. The implied discretion to reject related to reasonable concerns about job performance in the future. The test described by the Board in that case, implying that an employer can reject persons "it believes to be unreliable or incompetent or otherwise unqualified" also, on its wording, is indicative of restricting such an implied right to reject to matters or grounds affecting job performance or ability to do the work, without serious negative ramifications or risks.

26. In the instant case, there is neither suggestion of concern over job performance or suggestion of negative ramifications or that Meens presented any risk. We need not therefore sketch the parameters of what might constitute matters affecting job performance or ability to do the work, or negative ramifications or risk. There was no suggestion Meens' history of lost equipment rendered him a security risk or otherwise an unsatisfactory employee. The employer conceded he would have been rehired had he paid the \$46.00. This is not a situation where the employer was being asked to rehire a referred employee about whom it had qualms concerning his ability to work. The reason for rejection had only to do with Meens refusing to pay the money. The respondent in effect sought to utilize the hiring hall referral as a mechanism to allow it to unilaterally decide money was owing, and as a means of enforced collection. There was no suggestion, however, that the respondent could not have used one of the regular methods of resolving such disputes; for example, filing a grievance or making a claim in the civil courts. Either option would have required an independent adjudication of whether the money was owed. Instead, the respondent employer attempted unilaterally to circumvent the mechanisms created to resolve such disputes. In that, we find that the employer acted unreasonably.

27. Both through s. 44 of the *Labour Relations Act* and the provisions of the *Employment Standard Act*, the Legislature has indicated that disputes arising in certain contexts are to be resolved by independent adjudications, not unilateral action. The legislative policy enshrined in the *Employment Standards Act* in this regard is found in section 8 thereof, which reads as follows:

8. Except as permitted by the regulation, no employer shall claim a set-off against wages, make

a claim against wages for liquidated or unliquidated damages or retain, cause to be returned to himself, or accept, directly or indirectly, any wages payable to an employee.

A good discussion of that policy is found in *Ontario Hydro*, (1985, *supra*), where the Board wrote as follows:

7. In our view, section 8 is a piece of remedial legislation with a clear and specific purpose: employees who work for wages are entitled to be paid for the work they perform, and in the absence of statutory authority or written authorization, any claim whatsoever by their employer to all or part of that money must be asserted in a court of law. It is difficult to conceive of a clearer, more explicit or more comprehensive prohibition than the one found in section 8, which is clearly intended to prevent *any* unilateral deduction from, or retention of wages, *directly or indirectly*, based upon an employer claim against his employee. There is no special status for employer claims in respect of past wage payments, nor could there be without opening the door to the very mischief which section 8 was designed to avoid: shifting the onus to the employee - usually the weaker party in the relationship - to initiate action in order to recover what his labour has earned but his employer refuses to pay. Section 8 reverses the common law position, and shifts the onus to the employer to establish to the satisfaction of a court, not only that it is entitled to the payment, but also the terms on which such payment should be made. For example; even if an employee's debt were acknowledged in court, it is doubtful whether the court would permit a creditor to confiscate that employee's *entire income* for one or more pay periods. The *Wages Act* R.S.O., 1980 c. 526 limits the amount of a debtor's wages which may be subject to seizure or attachment without express Court authorization. Here the respondent asserts the amount it may seize and retain is 100%. Indeed, if the respondent's submissions are correct (and the employment relationship were maintained), the respondent could withhold payment of *any* wages to the grievor for several months until he had "worked off" what the respondent claims is owed to it. It could pay the employee 70% of his wages, 30% of his wages or nothing at all. And, of course, all of this is based upon the *fiction* that certain sums paid by mistake should be notionally treated as a "prepayment" of wages to be earned later, in different circumstances, for different services rendered, and over a different (and uncertain) time period, from which the respondent is entitled to deduct amounts which it determines are appropriate.

8. The thrust of section 8 is that a creditor should not be in a privileged position because he is the debtor's employer. His practical control over the payment of employee wages does not permit him to make unilateral deductions from those wages. While we have some sympathy for the employer's dilemma, it is precisely what the Legislature envisaged: the employer cannot unilaterally retain wages, but must seek its remedies in court, as it is apparently now doing. Nor do we think that we can simply take it for granted that the employer's claim against the grievor will be successful. As counsel correctly pointed out, there may be a legal distinction between payments made pursuant to a mistake of fact or a mistake of law, and it might be significant whether the overpayments resulted from an innocent misrepresentation or misunderstanding on the employee's part, or from real fraud. In any event, in accordance with the scheme envisaged by the *Employment Standards Act*, those are matters best left to a court to determine.

28. Although section 8 of the *Employment Standards Act* is not directly on point, as it does not encompass the hiring hall procedure of employee referrals, the policy contained therein, and as reflected and discussed in the quote set out immediately above, is of assistance in deciding whether the employer has acted unreasonably in rejecting a referred employee because the employer feels the employee owes it money. In situations in an industrial context, where employees work steadily for a given employer, the Legislature has decided that an employer, as purported creditor, should not be allowed to unilaterally decide whether employees owe it money and to unilaterally deduct those sums from wages otherwise owed. Given that the hiring hall provides "job security" in the construction context, the respondent's conduct in refusing to rehire the grievor over a \$46.00 sum is analogous to the type of conduct the Legislature presumably was concerned about in the industrial context in enacting the relevant provisions of the *Employment Standards Act*. We find that it is unreasonable for an employer to do so in the hiring hall context absent an explicit right authorizing it to do so. There is no such authorization in the agreement before us.

29. All these reasons lead us to conclude that the employer has acted unreasonably in the instant circumstances and the grievance succeeds on this ground as well.

30. The final issue is the question of the appropriate remedy. It was urged upon us by the respondent that the grievor and union had failed to properly mitigate their damages, and should they be successful in this grievance, damages ought to be restricted, given the small amount of the money in question and the unwillingness of the applicant or grievor to pay the \$46.00, thereby avoiding the refusal to rehire and any period of being out of work. We do not consider principles of mitigation demand a grievor or union pay the very sum in dispute. Mitigation is not a variant of the "work now, grieve later" doctrine. It appears to the Board each side felt that the principle at stake ought to be litigated, and neither side was willing to pay the \$46.00 in order to restrict damages to \$46.00 while still litigating that principle. In these circumstances, each party decided to bear the risk of losing and accordingly, we are not disposed to restrict the compensation that would otherwise be due to the grievor because of the respondent's breach. We find that the respondent breached the collective agreement in refusing to rehire the grievor when he was referred to it on October 16, 1986, and we direct the respondent employer to compensate the grievor in accordance with the usual principles for compensation in such circumstances. The Board remains seized with respect to compensation.

DECISION OF BOARD MEMBER I. M. STAMP;

1. I must respectfully dissent from the majority decision for the following reasons.

2. From the evidence before us there is no dispute that the grievor, Mr. Fred Meens, was indeed careless with the protective clothing supplied by the employer under Article 33.3 of the collective agreement on three separate occasions.

3. Article 33.3 states:

The protective clothing and equipment covered in section 33.1 and 33.2 that is provided by the Employer will be charged out to the employee and the employee shall be responsible for the return of such clothing and equipment to his employer.

4. Mr. Meens accepted this protective clothing and with it accepted the responsibility for it. He filled out "missing equipment reports" on each occasion. The wording of Article 33.3 is clear. The items were charged out to Mr. Meens and he was responsible for their return. Mr. Meens did not return these items as required under Article 33.3. In my opinion, I would have found that in this instance Mr. Meens was responsible for the welding jacket.

5. If Mr. Meens had to pay for his own protective clothing he would have had more incentive to be careful. However, whether it is his own equipment or the employer's it is expected that a competent journeyman takes care of his equipment and does not repeatedly leave it unattended.

6. Under the circumstances I believe the Employer should be entitled to ask for reimbursement under Article 33.3. This was the third incident within a short period of time and the employer did not ask for reimbursement for the first two items.

7. It is not practical for an employer to take this type of situation to small claims court, or to file a grievance against an employee.

8. The employer has no control over which journeymen are dispatched to the job. There is no opportunity to screen employees prior to hiring them. However, the employer can expect a

qualified journeyman who in addition to the skills of his trade is also able to work with a minimum amount of supervision.

9. The relevant provisions of the *Employment Standards Act* in the industrial context only kick in when actual deductions from wages are made, this is not the case here. In my view, the *Employment Standards Act* has no application in this case.

10. To avoid difficulties when seeking reimbursement for lost equipment, employers may wish to consider asking for a security deposit.

11. However, the majority decision of the Board does not preclude an employer from taking the position that a tradesman who continually loses his equipment and/or protective clothing is not a competent journeyman and can be rejected on that basis under Article 8.6(a).

12. On the issue of damages I respectfully disagree with my colleagues. It was open to Mr. Meens to pay the amount of \$46.00 under protest and then file a grievance. Furthermore, Mr. Meens' conduct contributed to the disappearances of the protective clothing, and in my view, is not entitled to damages. He had voluntarily terminated his employment the day after the last "lost equipment" incident to work out of his home local. Presumably when the work was finished in his home area Mr. Meens wished to return to the steady work available at Hydro.

3295-84-M Canadian Union of Public Employees - CLC, Ontario Hydro Employees Union, Local 1000, Applicant v. **Ontario Hydro (Line Work - Tweed Area Office)**, Respondent v. McBeath Brothers Contracting, Intervener

Dependent Contractor - Employee Reference - Partners carrying on business of pole line construction and blasting - Whether individuals are dependent contractors in relation to the respondent - Individuals in issue opposing application - Board jurisprudence with respect to section 106(2) and to the determination of the status of dependent contractor reviewed - Individuals found to be independent contractors - Application dismissed

BEFORE: *Thomas S. Kuttner*, Vice-Chair, and Board Members *I. M. Stamp* and *R. Wilson*.

APPEARANCES: *R. Ross Wells* and *Geoff Holland* for the applicant; *John B. West*, *Robert G. Thompson* and *Raymond W. Barbeau* for the respondent; *Ronald McBeath* for the intervener.

DECISION OF THE BOARD; June 23, 1987

1. Subsequent to the filing of this application, the Board, otherwise constituted, endorsed the record as follows:

- (1) This is an application under section 106(2) of the *Labour Relations Act* in which the applicant seeks a determination of whether certain individuals are "employees" of Ontario Hydro. For reasons enunciated in *Ontario Hydro*, [1981] OLRB Rep. July 931, the Board is satisfied that this is an appropriate issue for resolution under section 106(2) and accordingly, a Board Officer is hereby appointed to enquire into the status of the disputed individuals and the identity of their employer (if any). The attention

of the parties is directed to the principles enunciated in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538.

2. This is but one of several related applications in which the applicant, CUPE - CLC, Ontario Hydro Employees Union Local 1000 ("the union") seeks such a determination asserting that certain named individuals, in the instant case, Bill and Ron McBeath, are employees of the respondent Ontario Hydro and should be declared so to be, inasmuch as their relationship with the respondent is that of dependent contractors. The McBeath Brothers are in partnership and carry on business under the firm name McBeath Brothers Contracting, and are principally engaged in the business of pole line construction and blasting, which services they have contracted to perform for, *inter alia*, the respondent. No pretense is made that the two would enjoy employee status other than in a capacity as contractors dependent upon the respondent, and reliance is placed upon the inclusionary provisions of the Act which define an employee as including a dependent contractor (section 1(1)(i)) as the springboard for the section 106(2) application.

3. For reasons here given, the Board is of the view that this application must be dismissed, for neither Bill nor Ron McBeath can be said to be employees of the respondent Ontario Hydro within the meaning of the Act, whether as dependent contractors or in any other capacity. However, prior to considering the evidence adduced before the Board Officer earlier appointed which has led us to this conclusion, it would be apposite to review briefly the jurisprudence of the Board, both with respect to the function of section 106(2) and as to the determination of the status of the dependent contractor and this against the background of the relationship and the dispute now before us.

4. The Board cannot be blind to the fact that the determination here asked to be made masks a more profound dispute between the parties as to the scope of the recognition clause in the series of agreements binding between them, and in particular that in effect April 1, 1984 - March 31, 1985 during the time at which the instant dispute arose. Indeed, it was the position of counsel for the applicant that a finding of dependent contractor status as regards Bill and Ron McBeath vis-a-vis the respondent would be determinative of their inclusion in the bargaining unit for whom it holds bargaining rights, for it was asserted the language of that clause is inclusive of dependent contractors. The Board has in the past issued a *caveat* to those who would use its processes - and in particular that contemplated under section 106(2) to resolve bargaining disputes arising during the currency of a collective agreement, respecting the scope and extent of its terms. The legislature has ordained that "all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable" is to be resolved by final and binding settlement by arbitration - section 44(1). The reach of a recognition clause, that which sets, determines and defines the extent of the bargaining relationship between the parties, is *par excellence*, an issue best resolved through the arbitral process, particularly where, as here, the relationship is one extending back over four decades during which not only its contours, but those as well as of the supervening legislation under which it was established have been altered profoundly.

5. Thus, the equation "if an employee under section 106(2), then an employee under the agreement" is one which simply cannot be made and the Board rejects its validity if asserted. The Board is cognizant of the reference in the recognition clause to the definition of employee and its linkage to the statutory definition under the Act, but it is precisely that linkage, coupled with the expansive language of the recognition clause, at once inclusionary and exclusionary, which makes the issue of the scope of the recognition clause such a complex one. That complexity is further compounded by the longstanding recognition on the part of the union of the right of the employer to contract out work of the bargaining unit (see mid-term agreement PW-2, July 18, 1968). All of this only serves to underscore that it lies uniquely within the competence of the arbitral forum to

determine the reach of a collective agreement. The Board has said so in the past and it says so here. The question of whether a person is an employee is distinct from that of whether a person is embraced by the terms of a collective agreement, and it is only the former which the Board determines under section 106(2) of the Act, leaving the latter for determination through the process of arbitration. See *Ontario Hydro*, [1981] OLRB Rep. July 931, at para. 11, where the cases are collected.

6. There is a special reason for concern where, as here, the nexus between bargaining rights and a group of persons in dispute is to be founded on a broad determination of dependent contractor status. It is well known that classical labour relations legislation addressed but imperfectly the vexing question of employee status, and always the temptation existed to insinuate into its terms the common-law dichotomy between employee and independent contractor. Whether the boards in cases such as *Livingston Transportation Ltd.*, [1972] OLRB Rep. May 488 could withstand that temptation without legislative succour is a matter of some debate among the commentators, but it is generally recognized that what Professor Arthurs termed "the paradoxical plight of groups of competitors who may find survival difficult without collective action" precipitated amendments to the Act in 1975 creating the statutory class of dependent contractor. The Act now provides in section 1(1)(h) as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

7. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197, one of its earliest decisions to address the 1975 amendments, the Board through its then Chairman, Professor Carter, identified two purposes to be served by the statutory incorporation of the dependent contractor:

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

It is fair to assert that the great bulk of cases which have since followed have had as their focus the first of these two stated purposes. And indeed, this is not surprising given its emphasis by Professor Arthurs and the many other commentators who urged such statutory reform. The second purpose, so early identified by the Board as one of equal importance to the first, has not attracted the same degree of attention. However, from what the Board has stated of the instant dispute, it can be seen to be its focus.

8. The Board does not propose here an exhaustive analysis of this, the second declared purpose, of the expanded definition of "employee" in the Act to include the dependent contractor. It does however sound this note of warning. Where, as here, the bargaining relationship embraces an industry - construction - characterized by a high degree of mobility and specialization on the part of both employers and employees which finds expression in the contracting and sub-contracting of work by owners/clients to those who ply a specialized trade, and where moreover, as here, explicit recognition is given by the bargaining agent of an owner/client's own work force of its right to contract out work, then a special vigilance must be taken to ensure that recourse to section 106(2) is not being had in order to expand bargaining rights rather than to protect them from an

asserted erosion. Section 106(2) is not to become an organizational tool where, as here, the persons with respect to whom dependent contractor status is sought, themselves oppose the application made. All of this is said not by way of judgement, but to underscore the Board's earlier jurisprudence which gives to section 106(2) and proceedings brought under its terms, a limited scope indeed.

9. The Board turns now to the issue of substance before it: dependent or independent contractors, which term most accurately describes the relationship between Bill and Ron McBeath and the respondent? The statute itself directs us to address the question functionally. Whatever the trappings of the relationship be, the terms and conditions of work or services rendered by one person for another dictate the status of dependent contractor where they lead to the two-fold conclusion:

- (a) that he is in a position of economic dependence upon that person;
- (b) under an obligation to perform duties for that person

and in both respects more closely resembling the relationship of an employee than that of an independent contractor.

10. In its varied jurisprudence, the Board has taken several approaches to the functional analysis demanded by this definition. In *The Citizen*, [1985] OLRB Rep. June 819, the Board spoke of clusters of factors, three in number. The first of these focus on the identification of the company with the alleged dependent contractor; the second upon ownership of equipment; and the third upon the financial arrangements between the parties. By far the most exhaustive treatment of the issue is to be found in the Board's decision in *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057, where a congeries of factors was enumerated to assist in the determination of dependent contractor status. These we reiterate here and adopt as our own in the instant enquiry, but of course with reference to the "special environment" within which it arises. The Board there stated at paragraph 64:

64. From this survey of the legal landscape, and the special environment of the entertainment industry, we can now attempt to distil some of the features which individually, or in combination, have been relied upon to support a finding of independent contractor status. It is recognized of course, that a listing such as this must necessarily be somewhat artificial. The factors are interrelated, and one is often only the converse of the other. No one factor, in itself, will be significant. However, all of these matters were mentioned or relied upon in one or more of the cases to which we have already referred and, if present, support a finding that an individual is "self employed":

1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
2. *Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of

business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss": that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. *The selling of one's services to the market generally.* If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.
5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has 'tied his fortunes'.
6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.* Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the *whole* of his working time during the period to the service of the employer, promote its organization, or fill in his "non-performing" time with unrelated ancillary duties. (See: *Whittaker, supra.*)
8. *The degree of specialization, skill, expertise or creativity involved.* If these are dominant elements in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.
9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.* However, it is the *right* to interfere

rather than the *ability* to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship *at will* and *without cause* may indicate an employment relationship whether or not the employer exercises this power.

10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).
11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that s(he) will be considered an employee.

11. Viewed against those factors, what are the facts here before us? Ron and Bill McBeath have carried on business as a partnership under the name McBeath Brothers Contracting since August 1984. Both are journeymen electricians and experienced linemen in the industry who have worked for a variety of utilities and private contractors. Bill was an employee of the respondent for a twelve-month period between October 1980 and October 1981, whereas Ron has never been so employed. Each is certified for the work in which they engage by the Association of Municipal Electric Utilities (AMEU), a certification not normally possessed by employees of the respondent engaged in line work.

12. The business of McBeath Brothers Contracting is pole line construction. This is a specialized sub-trade within the construction industry which could be said to fall within several of the sectors defined by work characteristic under the Act. The work is straightforward. An owner/client requires poles constructed to specification for the stringing of power and other lines. Holes are dug, poles placed, anchored by guy wires, framed in and the hardware for lines affixed - all this to job specifications dictated by the owner/client, in this case the respondent.

13. It should not surprise that the purchasers of the services of McBeath Brothers Contracting are few in number. The erection of poles for stringing lines serves a limited, albeit important function and the economic structure of public utilities services in Canada dictates that the user class will be limited. To a great extent, users, such as the respondent, engage in pole line construction themselves, using an internal work force. To the extent that users do not do so, they form a small oligopoly purchasing this service from contractors whether large or small such as McBeath Brothers Contracting. The evidence reveals that in the fourteen-month period prior to October 1985, sixty percent of the time spent by McBeath Brothers Contracting in pole line construction was in performing such services for the respondent; a further twenty-five to thirty percent of their work was performed for Bell Canada and the remaining ten to fifteen percent for a variety of purchasers including the Belleville Utilities Commission, Domtar of Canada, Public Works Canada, and Piggden's Mechanical Limited, a private contractor for whom such work was performed on a sub-con-

tracting basis. The great bulk of this work was performed personally by the two McBeath Brothers, although occasionally the partnership would engage employees on a "piece-work" basis to meet contractual requirements, and this was the case, from time to time, in the performance of services for the respondent.

14. Contracts for pole construction are obtained in two different manners. Some projects are put up for tender by owner/clients and contractors in the industry bid on a competitive basis. Such a bid would be on an all-inclusive basis after estimate by the contractors of the work required for the job. Bill McBeath estimated that fifty percent of the work performed by McBeath Brothers Contracting for the respondent in the fourteen-month period preceding October 1985 was on such a tender bid basis. An alternative mechanism for the setting of contracts was the unit price method. Each year, McBeath Brothers Contracting would establish a unit price for each function associated with pole construction, i.e. delivering poles, augering holes, setting poles, anchoring, guying, cribbing, framing, stringing conductors, installing transformers and pole removal. In addition, contract prices could be set by reference to an hourly rate for the performance of certain skilled work, i.e. backhoe operator, compressor operator, chain saw, matting, etc. Often, where contracts were set on a unit price basis, the term of the contract was not stipulated specifically, payment being on an hourly rate and the total number of hours required to perform the job determined only on an as completed basis.

15. Such was the case with one particular job, ultimately of thirteen weeks duration, in which thirteen separate weekly contracts were set as the work progressed. In that particular set of contracts, the setting of fifty-nine poles on a priority basis, McBeath Brothers Contracting was retained specifically because of the expertise of the two brothers in blasting. Employees of the respondent are not trained in the use of explosives, and their experience with dynamite is limited in the words of the area foreman, David Marshall, "to know enough to stand back." Not only was blasting expertise and experience required for that particular project, but in addition specialized equipment including a compressor. This like other equipment such as the back-hoe, trucks, hand tools etc. are routinely used by McBeath Brothers Contracting in the performance of pole construction work and such equipment is owned, maintained and insured by them - or alternatively, rented if required. The annual unit price list indicates that McBeath Brothers Contracting could supply poles if needed, although in the case of the respondent these are supplied from its own in-house inventory.

16. Much pole construction work is carried on in tandem with the owner/client's own in-house work force, and this is the case with the respondent. However, McBeath Brothers Contracting sets its own terms and conditions of work. Needless to say, hours of work must be coordinated with the employer's own work crew if performance of the contract is to be efficient. However, the contractor makes the ultimate determination of the rate at which the work is to be performed, whether on a daily basis or otherwise, the days on which the work is to be performed and the integration of the particular contract with the many others in which it might be simultaneously engaged. In other words, it is the contractor who sets his contract priorities, although often, as in the case of the setting of the fifty-nine poles earlier referred to, this contract was awarded on a first priority basis, and was treated as such by McBeath Brothers Contracting. Work methods are left for determination by the contractor, although the finished product must comply with the detailed specifications established by the owner/client, in this case the respondent. In the ordinary course of events, the owner/client has indicated in general terms the extent of work required and the manner in which it wishes it performed. This is the "lay-out" and one was set for this particular job - the setting of the fifty-nine poles. Present throughout the thirteen weeks required for the completion of that project was a journeyman lineman acting as sub-foreman for the respondent's crew - Stan Stein. Work was coordinated upon a daily basis between Stein and the McBeath Brothers, and it

was one of Stein's functions to ensure that the respondent's job specifications were complied with. However, despite his perception of supervisory authority over the two brothers, such was not in fact exercised by Stein or vested in him. Certainly he had no control of a supervisory nature over their relationship with the respondent, whether disciplinary or otherwise. Nor did his authority extend to control over their work methods. This could not be the case given his lack of expertise in the very skill for which they had been retained - the blasting work and operation of the compressor.

17. Finally, a word must be said on the entrepreneurial activity of the two brothers. Advertising is kept to a minimum, and although McBeath Brothers Contracting does sponsor a sports team, a stock car, and a hockey player - all of which involves some degree of advertising, both visual and through radio, the bulk of their business depends on direct contact with potential and ongoing customers. This is understandable given the small pool of owner/clients who would require their services. Business cards are distributed to public utilities companies and other contractors in the business, and at the same time, these are provided with the annual inventory unit price list. Bill McBeath estimated that some twenty to twenty-five hours per month would be spent in soliciting contracts, and this sufficed to keep the two sufficiently busy so that on occasion work must be turned down. McBeath Brothers Contracting invoices for work and services performed as noted above, either on the unit price basis or in accordance with a tender. The two brothers themselves are then reimbursed by the partnership and it is through McBeath Brothers Contracting that U.I.C., Workmen's Compensation, Canada Pension Plan and Income Tax deductions are made.

18. How do these facts, which reveal a successful small business in this specialized field of pole construction, measure against the factors enumerated in *Algonquin Tavern, supra*? That McBeath Brothers Contracting has in the past used and asserts the right to use substitutes has been testified to, although it is fair to say that in the great bulk of contracts awarded the bargain is fulfilled with the labour of the two brothers, rather than with that of someone else. Generally, the partnership supplies its own tools, equipment, appliances and instrumentalities indicating something in the nature of a capital investment, although such might not be said to the same extent in the supply of materials and in particular the poles erected. There is significant evidence of entrepreneurial activity in the soliciting of clients and shaping of a viable and specialized business. The services of McBeath Brothers Contracting are sold to the market generally, and although the market is, as noted above, an oligopsonistic one, this is not so much indicative of a relationship of dependency approaching that of the dependent contractor, as it is of the structuring of public utilities within our economy. There is much economic mobility and independence, including the freedom to reject job opportunities and to work when and where the contractor so desires within the limited geographic area in which McBeath Brothers Contracting chooses to operate. Fees charged for services rendered are determined by McBeath Brothers Contracting on a unit price basis, although the standardization of the services rendered and the competitive nature of the market would tend to lead to a uniform fee structure. Nevertheless, the tendering process through which much contract work is attained indicates an independent contractor. The work of McBeath Brothers Contracting is not so integrated into the organization of the respondent as to be described as an essential element of its operating organization. Rather, it is work and services available to the respondent from a variety of sources. There is a significant degree of specialization, skill, expertise and creativity associated with the services performed by McBeath Brothers Contracting, and indeed it is that very skill and expertise which has led the respondent to engage them. Work is performed to detailed contract specifications, but McBeath Brothers Contracting reserves to itself control over the manner and means of such performance. There is little interference with the activity of the brothers except to assure compliance with the job specifications. The terms and manner of payment of contract indicate an independent contractor. Finally, the services rendered by McBeath Contracting, although related to those performed by elements of the respondent's own

work force, differ sufficiently from them and are performed under conditions significantly different as to make it clear that they are separate and distinct from that work force.

19. These facts reveal a relationship far different from that facing these same parties either in the tree removal case (*Ontario Hydro, Bancroft Area*, [1986] OLRB Rep. June 790), or in the meter reading case (*Ontario Hydro, Meter Reading: Kingston area office*, OLRB File #3294-84-M), in both of which the Board was of the view that the relationship between the respondent and the disputed contractors was such as to constitute the latter dependent contractors unto the Act. Here, there can be no doubt but that the statutory definition has not been met under either of its heads. Neither Ron nor Bill McBeath perform work or services for the respondent for compensation or reward on such terms and conditions such that they can be said to be in a position of economic dependence upon, and under an obligation to perform duties for the respondent more closely resembling the relationship of an employee than that of an independent contractor. The two, carrying on business under the name McBeath Brothers Contracting, are independent contractors, and neither is an employee of the respondent for the purposes of the Act. Accordingly, and in view of the foregoing, this application is dismissed.

3096-86-R United Steelworkers of America, Applicant v. Kenoyd Limited trading as Pickering Welding & Steel Supply, Respondent

Bargaining Unit - Certification - Construction Industry - Construction industry employer and construction industry employees - Trade union not a construction industry trade union - Whether bargaining unit should be described in terms of "all employees" rather than by reference to the trades or crafts that were at work on the date application made - Danger of fragmentation and disruption if unit limited by trade - All employee unit appropriate - Certificate issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *P. Turtle* and *W. Curtis* for the applicant; *M. E. Geiger*, *Lloyd Henning* and *Jerry Randall* for the respondent.

DECISION OF THE BOARD; June 5, 1987

1. At the continuation of the hearing of this application for certification, both the applicant and the respondent submitted that the appropriate bargaining unit should be described in terms of "all employees" rather than by reference to the trades or crafts that were at work on the date this application was made. The respondent is an employer in the construction industry and its employees are employees in the construction industry. In *Fielding Construction Limited*, [1970] OLRB Rep. Jan. 1205 the Board wrote at paragraph 8:

"With respect to the 'all employees' unit which the applicant is seeking, the Board has expressed concern about bargaining units of construction industry employees belong [sic] all inclusive, as they are when described in terms of 'all employees'. Such units may well lead to jurisdictional disputes particularly where only one or two trades are employed at the date of the making of the application. The Board has, therefore, where employees in the construction industry are involved, described the appropriate bargaining unit in terms of the trades on the job on the date of the making of the applications, see, for example, *Winter & Son* case, OLRB Monthly Report, February 1967, p. 889, 890. It follows that if the Board were to accede to the agreement of the

applicant and the respondent and determine a bargaining unit, with respect to the respondent's employees in the construction industry, in terms of 'all employees of the respondent employed at and working out of Copper Cliff', the Board's remarks on jurisdictional disputes would apply with even greater force."

2. The applicant herein is not a trade union that pertains to the construction industry. While that does not preclude the applicant from seeking certification for the employees of the respondent (see our decision in this matter dated March 31, 1987, [1987] OLRB Rep. April 595) the applicant cannot take the benefit of the construction industry provisions of the *Labour Relations Act*.

3. The employees of the respondent in this case perform both construction and non-construction work, but by reason of section 117(b) are employees in the construction industry. The parties submit that the respondent's methods of operation and the way in which it organizes its work and work force supports the position of the parties. In our view, the potential danger averted to in *Fielding Construction Limited, supra*, case is far outweighed in the matter before us by the possibility of fragmentation and disruption to the respondent's operations that could occur if we were to limit the description of the bargaining unit to only the trade or trades working on the date of application.

4. Additionally, as the employees of the respondent work at job sites away from the respondent's plant in Bowmanville, the parties submitted that the Board should use the phrase "at and out of" in the bargaining unit description. Counsel for the respondent suggested that the situation in this case is similar to employees involved in transport who work away from the respondent's premises. Counsel cited *Brantox Holdings Limited* [1969] OLRB Rep. Aug. 609 and *Capital City Transport Limited* [1969] OLRB Rep. Feb. 1170. Counsel also made specific reference to *Cooper's Crane Rental Limited*, [1980] OLRB Rep. Sept. 1286, in which similar language was used in describing the appropriate bargaining unit in relation to employees working for a crane rental business.

5. Therefore, having regard to the agreement of the parties and for the reasons aforesaid, the Board finds that all employees of the respondent working at and out of Bowmanville save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining, at the time the application was made, were members of the applicant on February 24, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will issue to the applicant.

0419-87-R Ontario Public Service Employees Union, Applicant v. Queen's University at Kingston, Respondent v. Canadian Union of Public Employees, Intervener

Certification - Practice and Procedure - Pre-Hearing Vote - Applicant requesting Board to direct the respondent to make available a list of names and mailing addresses of all employees in the voting constituency - Board not prepared to entertain request because it was not made at the labour relation officer's meeting convened for the purpose of dealing with all matters arising out of the application and request for a pre-hearing representation vote - Vote directed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

DECISION OF THE BOARD; June 10, 1987, as amended June 26, 1987

1. This is an application for certification in which the applicant has requested a pre-hearing representation vote.
2. The name of the respondent is hereby amended to read "Queen's University at Kingston".
3. In accordance with its usual practice, the Board, by order dated May 25, 1987, appointed a Labour Relations Officer to examine the records of the applicant and the respondent and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of any vote which might be directed and other matters relating to entitlement to and arrangements for such a vote, as well as "any other matter relating to the application".
4. The Officer so appointed met with the parties on June 4, 1987. During that meeting, the parties agreed on a bargaining unit description, evolved a voters' list and set out their positions on the inclusion in or exclusion from the bargaining unit of a number of individuals. They also agreed on the time and place of the vote and the form of the ballot. In addition, the question of the Canadian Union of Public Employees' ("CUPE" 's) status was raised. With respect to the participation of CUPE herein, the applicant contends that CUPE does not have status to make representation on bargaining unit issues that do not affect CUPE's interests. CUPE's status and the extent of its participation can be considered by this Board at the post-vote hearing referred to below.
5. A pre-hearing representation vote is intended to expedite the certification process. To that end, the Board will normally direct that a vote be taken to determine the level of the union's support prior to resolving any disputes between or among the parties where there is an appearance of sufficient support in accordance with subsection 9(2) of the *Labour Relations Act* ("the Act"): see *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989. The Board will not reach a decision on matters in dispute; if such matters "are so complex that there is no reasonable utility in conducting a vote before resolving those concerns or issues", the Board will likely not direct that a vote be taken: *St. Clair College of Applied Arts and Technology*, [1984] OLRB Rep. Dec. 1776. The issues raised during the Officer's meeting in this application can be addressed at a hearing following the taking of the pre-hearing representation vote, at which time the parties will have the opportunity to produce evidence and make full submissions.
6. The parties are agreed on the description of the bargaining unit. Having regard to the agreement of the parties, the Board determines that the voting constituency will be

all support staff of the respondent in the County of Frontenac save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods and employees in bargaining units for which any trade union held bargaining rights as of May 13, 1987.

The use of the "County of Frontenac" to establish the geographic scope of the unit is intended to encompass certain facilities of the respondent located outside Kingston but within the County of Frontenac. The Board also notes the wording of this description and its departure from the usual "office and clerical" or "clerical" phrasing and reminds the parties that they may be required to make submissions on this description to the Board when the hearing is held after the vote. The Board further notes the parties' agreement that "support staff" does not include faculty members, professional engineers, chartered accountants, professional librarians and physicians. The respondent is of the view that "support staff" does not include "adjunct academics and academic assistants, teaching staff and graduate and undergraduate students engaged in academic activities". The applicant takes the position that the phrase "support staff" does not include "persons properly engaged in teaching". The intervener takes no position on that issue. The respondent takes the position that the phrase excludes "chartered accountants *or equivalent*", while the applicant and intervener maintain the underlined words are not appropriate.

7. Although the parties have agreed on the description of the unit, they have raised a considerable number of challenges to the inclusion of particular individuals in the unit. In this regard, it is noted that the intervener and the respondent are party to three collective agreements. The agreement with respect to CUPE Local 1302 covers 'all employees of the Library and Archives' with certain exclusions. The agreement covering CUPE Local 229 encompasses "any employee of the Campus Engineering Services, Residence Operations, Parking Staff and certain staff in the Donald Gordon Centre, Physical Education Centre and General Services Group as agreed upon" with certain exceptions, including "clerical, office and technical staff". The collective agreement with respect to CUPE Local 254 defines members of the bargaining unit as "all employees of Queen's University working in a technical capacity in any teaching or research laboratory, a shop related to any laboratory, or other related area or other mutually agreed areas for more than 17.5 hours in a week" with exclusions. There does not appear to be any contention by either the intervener or the respondent that the applicant is seeking to represent employees already represented by the intervener and indeed, on the wording, there seems to be no overlap between the agreed-upon unit and the collective agreement descriptions. CUPE will not appear on the ballot since this application does not constitute a raid by OPSEU. On the contrary, the dispute centres on the *exclusions* from those units. The respondent and intervener contend that the phrase "employees in bargaining units for which any trade union held bargaining rights as of May 13, 1987" includes all employees covered by an exclusion from subsisting collective agreements.

8. The challenges to the inclusion of certain persons in the unit which is the subject of this application appear to be based on the unique proposition that exclusion from a unit represented by one union means exclusion for all time. To the extent that the exclusion from CUPE units was on the basis that the individuals exercised managerial or confidential functions, it is not clear whether such exclusions were on the agreement of the intervener and the respondent or resulted from a determination by the Board that such persons were to be excluded pursuant to paragraph 1(3)(b) of the Act. Only decisions by the Board have any significance in such a context.

9. The applicant challenges the inclusion of the following individuals in the bargaining unit:

<i>Sch./P.</i>	<i>No.</i>	<i>Name</i>	<i>Reason</i>
A/15	19	K. Pearce	Supervisor
A/15	24	H. Pelletier	manager and academic.

10. The respondent challenges the inclusion in the bargaining unit of the following individuals:

<i>Sch./P.</i>	<i>No.</i>	<i>Name</i>	<i>Reason</i>
A/4	25	R. Conway	excl. from L.254
A/5	6	J. Crawford	excl. from L.254
A/6	14	K. Duttie	excl. from L.229
A/8	25	L. Harris	comm. of int. with L.254
A/14	19	D. Muncey	excl. from L.254
A/15	20	D. Pearse	excl. from L.229
A/19	5	R. Smithies	excl. from L.254
A/22	2	P. Bryson	part-time
	3	M. Burns	part-time
	6	K. Carruthers	part-time
	21	M. Hood	part-time/managerial
A/23	3	S. Lillis	part-time
	9	R. Meers	part-time
	20	C. Purcell	part-time
	25	J. Sinnott	part-time
A/26	1	Arrowsmith	not employee (at Queen's)
	2	P. Brown	supervisor
	4	E. Cerisana	supervisor
	5	M. Coates	not employee (at Queen's)
	6	Duttie	not employee (at Queen's)
	7	E. Gargaro	supervisor
	8	B. Gee	supervisor
	9	Gower	not employee (at Queen's)
	10	T. Grice	supervisor
	11	La Croix	supervisor
	12	Ladouceur	not employee (at Queen's)
	13	B. Livingstone	supervisor
	15	M. Nash	supervisor
	16	R. Price	super/excl. from L.229
	17	Williams	not employee (at Queen's)
	18	M. Zureik	supervisor
	19	J. Row	supervisor
	20	G. Bastianutti	supervisor
	21	P. Candido	not employee (at Queen's)
	22	M. Chirinian	part-time
	23	S. Cutway	supervisor
	24	J. Deslauriers	supervisor
	25	F. Dunphy	excl. from L.254
	27	L. Freeman	supervisor
	28	L. Garrison	not employee (at Queen's)
	31	R. Graham	teacher
	32	J. Harris	supervisor
	33	D. Horsley	excl. from L.254
	35	J. Jarus	not employee (at Queen's)
	36	M. King	supervisor

A/27	1	G. Laporte	supervisor
	2	M. Lusk	supervisor
	3	T. Martin	not employee (at Queen's)
	4	S. Needham	supervisor
	5	J. Niemann	supervisor
	6	E. Potts	comm. int. with L.254
	7	A. Potvin	teacher
	8	P. Scott	supervisor
	9	R. Snetsinger	teacher
	10	J. Topping	supervisor
	11	J. Troughton	not employee (at Queen's)

11. The intervener takes the position that R. Price should be excluded on the basis of exclusion from Local 229 and of a community of interest with the employees in the unit represented by Local 229, that S. Cutway has a community of interest with employees represented by Local 254, and agrees with the respondent that F. Dunphy and D. Horsley should be excluded from the unit on the basis of exclusion from Local 254. The intervener also agrees with the respondent that E. Potts should be excluded because of a community of interest with employees in the bargaining unit represented by Local 254 and that A. Potvin should be excluded on the basis of being a teacher. CUPE also agrees with the respondent with respect to R. Conway, J. Crawford, K. Duttie, L. Harris, D. Muncey, D. Pearce, R. Smithies and R. Meers (and also contends R. Meers has a community of interest with employees represented by Local 229). The intervener takes the applicant's position with respect to K. Pearce and also maintains that K. Pearce has a community of interest with employees represented by Local 229 (because parking and security constitute a department and since parking is part of the Local 229 unit, security shares a community of interest with the Local 229 unit). CUPE takes no position with respect to any other challenges by the applicant or by the respondent. In addition, the intervener seeks the exclusion of the following persons from the unit:

<i>Sch./P.</i>	<i>No.</i>	<i>Name</i>	<i>Reason</i>
A/8	20	B. Hamilton	comm. of int. with L.229 (See above: K. Pearce)
A/13	1	F. Manning	comm. of int. with L.229
A/18	20	C. Skipper	comm. of int. with L.229 (see above: K. Pearce)

12. It appears to the Board, having examined the records of both the applicant and the respondent, that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made.

13. Having set out all matters relating to this application, there remains one more matter for this panel to consider and determine since it concerns a request relevant to the period prior to the taking of the vote.

14. Following the meeting convened by the Officer, counsel for the applicant, by letter dated June 5, 1987, raised a new issue, one which had not been raised during the Officer's meeting. The applicant asked the Board "to direct the respondent to make available to OPSEU [the applicant] and the intervener a list of names and mailing addresses of all employees in the voting constituency".

15. The Board has made such a direction in the past. In *The Board of Education for the City*

of York, [1985] OLRB Rep. May 767, the Board directed a pre-hearing representation vote with respect to a unit of occasional teachers and also directed that the respondent provide the union with a list of the names and addresses of the members of the voting constituency, in large part, at least, because of the “dispersion of the electorate”. The provision of such a list was, in the Board’s view, “necessary to ensure an informed electorate” where there was no regular work place for many of the teachers and no automatic right of access to the union to school premises. For similar reasons, the Board directed the employer to provide a list of names and addresses to the union in *Scarborough Board of Education*, [1985] OLRB Rep. July 1164 (see reconsideration [1986] OLRB Rep. Mar. 361 in which the Board confirmed its direction to the employer).

16. In this instance, however, the Board is not prepared to entertain the applicant’s request because it was not made at the Officer’s meeting.

17. The Officer’s meeting with the parties is crucial to the pre-hearing representation vote process. The parties are on notice prior to attending the meeting that the Officer is convening the meeting to deal not only with specified matters such as the description of the bargaining unit and voting arrangements, but also with all other matters arising out of the application. While many issues are dealt with by agreement, and others are dealt with by a simple statement of the parties’ positions, other issues may require somewhat more extensive submissions by the parties. The Officer records the results of the meeting, including the agreements and disagreements of the parties, in a report which is read to the parties, signed by them and then transmitted to the panel assigned to determine whether a pre-hearing representation vote is appropriate. Where the parties wish to make additional submissions the Officer sets a date by which such submissions are received by the Board and makes a note to that effect in the report.

18. The panel assigned the file then determines *on the basis of the Officer’s report* and any additional submissions filed by the parties pursuant to the Officer’s instructions at the meeting, whether it should direct a pre-hearing representation vote. To do so, it must be confident that all relevant matters have been raised by the parties and have been addressed by all parties. While the Board at this stage does not resolve or consider matters in dispute, it must be aware of all matters in dispute in order to determine whether a pre-hearing vote is appropriate or whether it is precluded by the nature of the contentious issues. Similarly, the nature of the issues will determine whether the Board directs that the ballot box be sealed. The importance of the Officer’s meeting to this process should be clear on these grounds alone.

19. There is, however, another factor which must be considered. It is vital to the expeditious processing of pre-hearing representation vote applications that the Board know that all relevant issues have been canvassed in the Officer’s report and that the parties have had an opportunity to make submissions on those issues. The parties may make additional submissions at the hearing held after the taking of the vote pursuant to subsection 9(4) of the Act, but they are required to state their basic positions at the Officer’s meeting in order to permit the other parties an opportunity to respond in a fashion which is timely within the specific context of pre-hearing representation votes.

20. While the applicant’s request in this case does not appear relevant to the basic question of whether a vote is appropriate, it does raise an entirely new issue to which the other parties have not had an opportunity to respond. To allow this request to stand and invite submissions from the other parties would endanger the expedition which is at the core of subsection 9(1) applications. Had the matter been raised at the Officer’s meeting, it may have been resolved there, at least to the parties’ satisfaction (since the Board is not bound by parties’ agreements). At worst, the other parties would have been on notice immediately that their submissions on the issue were required

by the Board within the time specified by the Officer. In this respect, we note that this is a matter which the Board is required to resolve prior to the votes being held and not one which can be heard by the Board after the taking of the vote.

21. While there was no indication in *The Board of Education for the City of York, supra*, when the request for the list was made, it was stated explicitly in the *Scarborough Board of Education* case, *supra*, that the issue was raised at the Officer's meeting. In any case, in this instance, this matter was not raised at the meeting, nor is there any suggestion that it was.

22. In light of our conclusion, we do not make a determination on the merits of the request. However, we do make the following observations. It was of significance in *The Board of Education for the City of York, supra*, that the occasional teachers were dispersed and not attached on a regular and consistent basis to a particular work location. While that may not constitute the only circumstance in which the Board is prepared to direct the delivery of a list of employees' names and addresses to the applicant by the respondent, such a direction will usually be predicated on factors which put the union at a disadvantage vis-a-vis the employer with respect to communicating its position and views to the employees. The applicant herein cites as a reason for its request that "[t]he bargaining unit is distributed throughout a number of locations in the City of Kingston and it is not open to the applicant to distribute its literature in these premises". There is no indication why the applicant is disabled in this way - whether, for example, there is a legal, physical, financial or other impediment. Where a party makes such a request, it must clearly explain why its circumstances warrant a direction that the employer provide names and addresses.

23. In this instance, however, the Board is not directly concerned with the sufficiency of the applicant's submissions since it rejects the applicant's request because it was not raised at the Officer's meeting.

24. The Board hereby directs the taking of a pre-hearing representation vote in this matter.

25. All employees of the respondent in the voting constituency on June 2, 1987, who have not voluntarily terminated their employment or who have not been discharged for cause between June 2, 1987, and the date the vote is taken will be eligible to vote.

26. If any of the individuals listed in paragraphs 9, 10 and 11 above attends to vote, he or she is to be allowed to vote and any ballot so cast segregated.

27. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

28. This matter is referred to the Registrar to make vote arrangements and, pending the outcome of the vote, to schedule a hearing at which the parties may address the issues in dispute.

2701-85-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. VS Services Ltd., Respondent

Bargaining Unit - Certification - Whether Board should grant a municipal-wide unit in the context of a non-vending food service operation - Prevailing pattern in industry of collective agreements with client-specific scope clauses - Bargaining unit described by reference to client's name

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *E. G. Theobald*.

APPEARANCES: *Frank Luce*, *Milt Aylwin* and *Pat Powers* for the applicant; *Wallace Kenny*, *R. Ellis* and *C. Kelman* for the respondent.

DECISION OF THE BOARD; June 24, 1987

1. In a decision dated March 3, 1986 regarding this application for certification, the Board, differently constituted, wrote as follows:

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties were in partial agreement with respect to the bargaining unit description. The extent of that agreement is as follows:

all employees of the respondent ... save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff and those employees in any bargaining unit for which a trade union held bargaining rights as of February 4, 1986.

4. The respondent further wished the exclusion of "persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". The applicant indicated that, if a record check confirmed that there were such employees, the applicant had no objection to that exclusion sought by the respondent.

5. The parties were in dispute as to the appropriate geographic scope of the bargaining unit. That is, the applicant sought a bargaining unit described by reference to the Municipality (Chatham, Ontario) while the respondent asserted that the description should be limited to the street address (566 Riverview Drive, Chatham, Ontario).

6. Accordingly, the Board hereby appoints a Board Officer to inquire into and report back to the Board with respect to the appropriateness of the bargaining unit, given the applicant's and the respondent's positions and, further, on the appropriateness of the reference in the bargaining unit description sought by the respondent, to employees in its "industrial dining division", should the applicant's position with respect to the geographic scope be accepted.

7. The Board notes as well that the respondent reserved its right to raise an argument with respect to an asserted "build up" of the respondent's operations in and about Chatham, also should the applicant's position with respect to the geographic scope of the bargaining unit be accepted.

8. This matter is referred to the Registrar. This panel is not seized.

2. Pursuant to that appointment, Board Officer M. Zucker convened several meetings of

the parties between May 9 and November 23, 1986, and subsequently prepared a Report dated February 20, 1987, which was forwarded to the parties in accordance with the Board's Rules of Procedure. Counsel for each of the parties requested that a hearing be held to afford them an opportunity to make oral representations concerning the conclusions the Board should reach in view of the Report. Accordingly, the matter was listed for hearing before this panel of the Board on April 16, 1987.

3. The Report contains the following information concerning agreements reached during the examination process:

As a result of discussions between the Board Officer and the parties, the Applicant agreed with the Respondent's position that both Joanne Toyne and Joyce Hall be treated as "part-timers" for purposes of this application. Accordingly, the parties agree that a full time bargaining unit description contain an exclusion for "persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." The Applicant requests that the Board apply its usual practice to the issuance of a part-time unit.

The Applicant's position with respect to the appropriate geographic scope is that the bargaining unit be described by reference to the Municipality (Chatham, Ontario). It is the Respondent's position, however, that the unit be described by reference to the street address (566 Riverview Drive, Chatham) or, alternatively, by reference to the client's name (Eaton-Yale). In the event the Respondent's position prevails, the Applicant would prefer a reference to the client's name.

Should the Applicant's position with respect to the geographic scope succeed, the parties are agreed that the bargaining unit description include a reference to its employees in its "industrial dining division".

4. The Report also contains the following Agreed Statement of Fact:

1. The Respondent, VS Services Ltd. is a diversified service Company, providing food services, managerial expertise, health care services and housekeeping services to a widely divergent group of clientele in various sectors.
2. The Company has two main divisions, Versa Food Services and Versa Services. Versa Food Services (VFS) is further segmented into separate groups under the control of different persons. These groups are known as: Coffee Systems; Industrial Dining; Business Dining; Vending; and Restaurant & Leisure. Versa Services is also divided into groups to deal separately with the laundry, education, and health care areas.
3. In the City of Chatham, only the Vending and Industrial Dining groups of VFS have non-managerial employees. The Vending group operates out of the Company premises on Richmond Street in Chatham, where the District Supervisor of the Industrial Dining group also has her office.
4. The only contract in operation in Chatham held by the Industrial Dining group, at the time of the Application for Certification was a contract to supply cafeteria services at Eaton Yale, 566 Riverview Drive.
5. Since the date of Application, the Respondent has commenced performing another contract in Chatham to supply cafeteria services. This new contract is with Navistar International at its plant in Chatham. This contract commenced April 7 and staff were hired April 22nd. This contract was signed January 3, 1986.
6. An Application for Certification specific to the Navistar location was filed by the Retail, Wholesale and Department Store Union on April 29, 1986 (Board File No. 0287-86-R). The Applicant, Teamsters Local Union No. 647 intervened in the said Navistar Application. The Applicant filed a subsequent Application with respect to the Navistar location on June 6, 1986 (Board File No. 0684-86-R).

7. The terms and conditions of employment at Eaton Yale and at Navistar as of June 5, 1986 differ. [Examples are attached to the Agreed Statement of Fact.]
8. Each contract is a separate profit centre managed by a "component manager". The component managers at Eaton Yale and Navistar both report to the District Supervisor.
9. There is no interchange of employees between the Navistar and Eaton Yale operations.
10. The type of employees required to supply the service may vary from one client to the next depending on the type of service required. Some require service such as a sous chef, butcher, salad preparation, porters, dishwashers, waitress/waiters while others require only basic cafeteria operations. At Eaton Yale there are currently three classifications: General worker/cashier; general worker/cook lead hand; general worker/cook. At Navistar there are currently two classification [sic]: general worker; general worker/cook. The component manager occasionally assists with the cash and regular [sic] assists with the cooking at these two locations.
11. The respondent must bid new contracts in competition with companies such as T.R.S. Food Services Limited; Parnell Foods; G.B. Catering; Eastwood Food Services; Domco; Dalmar; Saga; Beaver Food Services; Rill Foods. Each bid must take into account the various service needs of the establishment in question.
12. V.S. Services has many collective agreements in Ontario with a variety of unions. All of its collective agreements have scope clauses which are limited to the specific clients or location to which the contracts apply, with the exception of the Company's Vending operations which have scope clauses on a municipal basis. Oshawa's contract is on a municipal basis and does not specifically refer to "vending" although the company operates strictly a vending operation under that contract.
13. The respondent's vending operations, which provide vending machines and service to various clients, operate out of one central location in a municipality. The employees employed at that location have routes which take them to various client locations to do their work.
14. The employees of the clients at Navistar and Eaton Yale who use the Company's services are covered by separate collective agreements with the Canadian Auto Workers Union.
15. The applicant Teamsters Local Union No. 647 is the bargaining agent for the Company vending group employees in Chatham. Members of the vending bargaining unit service both the Eaton Yale and Navistar locations, in addition to the other locations. The vending operation supplies change to the Industrial dining foor [sic] services operation at Eaton-Yale. The change is delivered by a vending route person to the component manager or his designate on a daily basis. Change at Navistar is obtained by the component manager through a commercial bank. The employees at Navistar and Eaton Yale provide change to customers if required for use in the vending machines. A vending rectification employee repairs vending machinery on site at these two locations when there is a break down including the all purpose merchandisers which are vending machines stocked by the cafeteria; the profits from the all purpose merchandisers accrue to the cafeteria.
16. The municipality of Chatham has a population of about 40,000. The Eaton Yale and Navistar plants are located within one mile of each other.

5. A sheet appended to that Agreed Statement of Fact contains the following information concerning some of the differences in terms and conditions of employment of the respondent's employees at Eaton Yale and Navistar:

	NAVISTAR	EATON YALE
Service Requirements	<ul style="list-style-type: none"> - maintain customer service area i.e. cleaning - cafeteria & mobile cafeteria (Mobile Cart) 	<ul style="list-style-type: none"> - not done - cafeteria only
Vacations	<ul style="list-style-type: none"> - 2 week summer shut down 	<ul style="list-style-type: none"> - variable
Holidays	<ul style="list-style-type: none"> - vary in two locations to reflect holidays given by client 	
Hours of Work	<ul style="list-style-type: none"> - 5:30 a.m. to 3:30 p.m. employees working - Monday to Friday 	<ul style="list-style-type: none"> - 24 hour operation - 7 days a week
Hours for Customer Service	<ul style="list-style-type: none"> - 6:00 a.m. - 6:50 a.m. - 9:00 a.m. - 9:15 a.m. - 11:55 a.m. - 12:40 p.m. - 2:15 p.m. - 2:30 p.m. 	<ul style="list-style-type: none"> - 22 hours a day
Shift Assignment	<ul style="list-style-type: none"> - fixed hours daily for staff 	<ul style="list-style-type: none"> - varying hours and shifts

6. Once they have completed their training period, component managers are responsible for hiring, scheduling, granting time off, requiring employees to work overtime, and disciplining employees, although they generally consult with their District Supervisor before discharging an employee. Employees receive the same benefits at each location, but the rates of pay vary from location to location depending upon the classifications of the employees and the profitability of the contract. Each industrial dining location is treated as a separate business unit, and there is no interaction between such locations. Karla Kelman, the General Manager of the respondent's Industrial Dining and Vending groups, indicated that after identifying a client's needs, the respondent develops a business plan for that particular client. In describing the varying needs of clients, she stated:

He may require anything from a very limited one meal service to a twenty-four hour service, including executive dining room facilities. Could be waitress service in his facility, could be restaurant style, could be cafeteria style, could be snack bar style, and with menus and appropriate services to meet those needs.

It was Ms. Kelman's uncontradicted evidence that the employees' conditions of employment are highly dependent upon the client's needs (because the respondent tailors its service to meet those needs). Hours of work, classifications, job responsibilities, wage rates, vacations, ratios of full-time to part-time employees, holidays, and other terms and conditions of employment can vary significantly from location to location, depending on the contract between the client and the respondent. It was also Ms. Kelman's uncontradicted evidence that if the respondent were to sign a municipal-wide collective agreement containing terms which might be appropriate for a single location, such as a guaranteed normal work week of forty hours, a guarantee of no split-shifts, specific shift premiums, a provision requiring overtime pay for all Saturday hours, or a specific list of holidays, it could have an adverse impact on the respondent's ability to bid on new business in the municipality.

7. It is evident from the exhibits entered during the examination process (and appended to the Report) that there has developed in the Ontario non-vending food service industry a wide-

spread practice of parties agreeing to bargaining units which are confined to an employer's operations in respect of a particular client (also referred to in this decision as a "client-specific" bargaining unit). It is also clear from those exhibits that the Board has accepted such agreements in determining bargaining unit configurations in that industry. Exhibit "A" indicates that the respondent has 41 collective agreements in its non-vending food service operations with scope clauses confined to a single client. Exhibit "D" lists numerous client-specific certificates which have been granted by the Board in respect of employees of other employers in the non-vending food service industry, including a number of the respondent's competitors.

8. In support of the respondent's position that the bargaining unit in the instant case should be described by reference to Eaton Yale's street address or by reference to that particular client, counsel for the respondent referred the Board to an unreported decision dated February 15, 1977 in *VS Services Ltd.* (Board File No. 1801-76-R). In that case, the applicant trade union sought a municipal-wide bargaining unit (for the City of Guelph), where the respondent employer had only one food service operation in that municipality. After noting that in the past it had "generally defined such bargaining units with respect to where the food service [was] being performed and not with respect to a municipality", the Board denied the applicant's request because it was not persuaded that the appropriate bargaining unit ought to be defined with respect to the City of Guelph.

9. The only instance that has been drawn to our attention in which the Board has granted a municipal-wide certificate in the context of a non-vending food service operation is *T.R.S. Food Services Limited*, [1980] OLRB Rep. Apr. 542. As in the present proceedings, the applicant in that case was Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (also referred to in the present decision as "Local 647"). In that case, the only food service operation carried on by T.R.S. Food Services Limited ("T.R.S.") in St. Catharines was at General Motors. In rejecting the employer's request that the bargaining unit be described by reference to that particular client, the majority concluded that "where the employer has but one location in the municipality, the geographic scope of the bargaining unit should be defined by reference to the municipality in which the [employer] is located". In reaching that conclusion, the majority expressed the view that the employer's proposal would unnecessarily strain the stability of the bargaining rights. However, they also noted that "in circumstances where an employer has two or more locations in a municipality, additional considerations relating to the actual community of interest shared between the particular locations may become relevant."

10. Although the respondent in the instant case did not have two (or more) locations in Chatham at the time of the application, it had signed a second contract a month before the application. Pursuant to that contract, the respondent commenced operation at a second location approximately two months after Local 647 applied for certification. There is nothing in the facts before us to suggest that the manner in which that second location was brought into operation (or operated thereafter) was in any way influenced by the fact that this application had been filed by Local 647. Indeed, a number of the details concerning the manner in which that second location was to be operated (such as the service requirements and hours for customer service set forth in paragraph 5 of this decision) are specified in the contract which, as noted above, was in existence at the time this application was filed with the Board. The evidence adduced before the Board Officer (without objection by the applicant) concerning the manner in which that location operates is confirmatory of those contractual provisions, and of the more generalised evidence of Ms. Kelman respecting the way in which the respondent's industrial dining division carries on business. It is clear from the totality of the evidence that the employees at those two locations do not share a sufficient community of interest to warrant their inclusion in a single bargaining unit. (See, generally, *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K-Mart Canada Limited*, [1981] OLRB Rep. Sept.

1250; *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260; and *National Trust*, [1986] OLRB Rep. Feb. 250.) Although some of the work at the two locations is similar and requires the exercise of similar skills, a number of the conditions of employment differ and there is no functional coherence or interdependence between the two locations. Each location has its own component manager who is responsible for hiring, scheduling, granting time off, requiring employees to work overtime, and disciplining employees (subject to consultation with the District Supervisor regarding discharges). Although Eaton Yale and Navistar are located within a mile of each other, there is no interchange of employees or other interaction between the two locations. Moreover, economic factors and the lack of a common source of work also favour separate bargaining units for those two locations.

11. It may also be noted that the evidence before us indicates that after being granted a municipal-wide bargaining unit by the Board in the *T.R.S.* case, Local 647 entered into a collective agreement that was confined to employees of T.R.S. working at General Motors in St. Catharines. Thus, notwithstanding the Board's decision that a municipal bargaining unit was appropriate, Local 647 subsequently agreed to conform with the prevailing pattern in the industry by entering into a collective agreement with a client-specific scope clause.

12. In the instant case, the evidence establishes that client-specific bargaining units have become the norm in this industry. Moreover, Ms. Kelman's evidence concerning the wide variance in the respondent's industrial dining division operations, and in the terms and conditions of employment which reflect the varied needs of individual clients (confirmed, in the instant case, by the evidence adduced before the Board Officer with respect to the respondent's Eaton Yale and Navistar locations), demonstrates that this norm reflects the labour relations and competitive realities of the industry. As submitted by counsel for the respondent, the inclusion of such disparate operations in a single bargaining unit would tend to place an undue strain on the collective bargaining process by creating a situation in which the Union would likely attempt to enshrine in a collective agreement specific terms and conditions of employment suitable to a particular location, while the employer would likely attempt to negotiate highly general provisions reflecting the "lowest common denominator" among the wide variety of potential services which it could be called upon to provide for future (and existing) clients.

13. Counsel for the applicant submitted that the Board should reject the client-specific unit proposed by the respondent because such units have resulted in "systemic discrimination" in the industry. However, it is unnecessary for us to comment on whether or not the existence of such discrimination would be a pertinent consideration in determining an appropriate bargaining unit as the evidence before us in these proceedings falls far short of supporting a finding of systemic discrimination.

14. For the foregoing reasons, the Board finds that the following constitute units of employees of the respondent appropriate for collective bargaining in the circumstances of this case:

all employees of the respondent at Eaton Yale in Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and those employees in any bargaining unit for which a trade union held bargaining rights as of February 4, 1986 ("bargaining unit #1");

all employees of the respondent at Eaton Yale in Chatham, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors,

persons above the rank of supervisor, clerical, office and sales staff, and those employees in any bargaining unit for which a trade union held bargaining rights as of February 4, 1986 ("bargaining unit #2").

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in each of the bargaining units were members of the applicant on February 14, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

16. Certificates will issue to the applicant in respect of bargaining units #1 and #2.

2660-86-M Canadian Union of Public Employees, Applicant v. The Town of Whitby, Respondent

Employee Reference - Whether yard foreman at seasonal marina performing managerial functions - Individual had been the foreman for only a short period of time when officer's inquiry conducted - Section 106(2) jurisprudence reviewed - Foreman found to be an employee

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Jim Woodward for the applicant; Heather J. Laing and William Wallace for the respondent.

DECISION OF THE BOARD; June 26, 1987

I

1. This is an application under section 106(2) of the *Labour Relations Act*. A question has arisen between the parties about the "employee status" of Mark Collins whom the employer describes as the "yard foreman". The employer asserts that Mr. Collins' functions fall within the parameters of section 1(3)(b) of the *Labour Relations Act*. The union asserts the contrary. Section 1(3)(b) reads as follows:

Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2. Section 1(3)(b) has been in the Act in its present form since 1957 when the emphasized words were added in order to clarify the Board's jurisdiction following the decision of the Supreme Court in *Re Canadian General Electric Company Limited and Ontario Labour Relations Board* [1956] O.W.N. 439, 56 CLLC ¶15,271 (reversed by the Ontario Court of Appeal at [1957] O.W.N. 277, 57 CLLC ¶15,318). If, in the opinion of the Board, a disputed individual exercises "manage-

rial functions" or is employed in a confidential capacity in matters relating to labour relations, he is not entitled to associate for collective bargaining purposes or engage in collective bargaining under the Act, and is denied any rights, privileges or benefits prescribed in the collective agreement between the applicant and the respondent.

3. In accordance with the Board's usual practice in these matters, the Board appointed an Officer to inquire into the duties and responsibilities of the disputed individual. Pursuant to that appointment, the Board Officer convened a meeting of the parties on the premises of the employer. At that meeting both parties were represented by counsel and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence which, they asserted, might bear upon the issues before the Board. At the completion of this examination the parties were asked if they had any further evidence or witnesses that they wished to call, and each party indicated that it did not. The evidence adduced was transcribed and reproduced, verbatim, in the Officer's report which was circulated to the parties for comment. Accompanying the report was a notice extending the parties the opportunity to make representations as to the accuracy of the report or the conclusions that, in their submission, the Board should reach in view of its contents. Those representations were received at a Board hearing scheduled for that purpose.

II

4. We do not think that it is necessary to reproduce here the details of the witnesses' testimony, nor refer to the many cases in which the Board has dealt with the application of section 1(3)(b) of the Act (see generally, J. Sack, Q.C. and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice*, 1985 (Butterworths) at pp. 79-103). It suffices to say that on the first branch of section 1(3)(b), what the Board is trying to assess is the degree and exercise of authority over other employees which would affect their economic position or job security, since the exercise of such authority, to any significant extent, would be incompatible with participation in the bargaining unit. The Board's approach to this part of section 1(3)(b) was elaborated in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 in a long passage to which we might usefully refer:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRB at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. The *Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially affect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).)

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.)

Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

...

7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

...

- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision-making.
- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision-maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory

decision-making style". Whatever value the latter may have in improving employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

There is no assertion by the employer that Mr. Collins is employed in a confidential capacity in matters relating to labour relations.

5. In refining the general approach outlined in cases such as *Corporation of the City of Thunder Bay* the Board has been mindful that the "effective recommendation test" mentioned in paragraph 4, must be applied with some care. As the Canada Labour Relations Board observed in *British Columbia Telephone Company and Federation of Telephone Workers of British Columbia et al*, 76 CLLC ¶16,015 at page 467:

In the past, certain Labour Relations Boards [meaning Ontario] have accepted that the existence of a power to "effectively recommend" hirings, dismissals or disciplinary action was an index of the performance of management functions almost as important as the actual making of such decisions. This raised many problems, not the least of which was the instant multiplication of the number of managers. Another one was, of course, the determination of how "effective" recommendations have to be and how often before it can reasonably be inferred that there truly exists a power to recommend effectively.

Nor has the Board put much weight on job titles, or even job descriptions, in the absence of affirmative evidence that the decision-making authority mentioned in such job descriptions has actually been exercised by the disputed individual. Too often, in the Board's experience, persons with "managerial sounding" job titles, or job descriptions turn out not to *exercise* much managerial authority at all; and, of course, it is the *exercise* of managerial functions which triggers the application of section 1(3)(b). (In this regard, see, for example, *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84.) Finally, the Board has been alert to the possibility that if section 1(3)(b) were construed too liberally, an employer could seriously erode the bargaining unit simply by "sprinkling" managerial functions around and purportedly subdividing the managerial role. The managerial structure and division of authority put before the Board in a particular case, must be viewed realistically and from a collective bargaining perspective. Thus, in *Caledon Hydro Electric Commission*, [1979] OLRB Rep. Oct. 924 at 929, the Board commented:

There is no magic number which defines the appropriate ratio of managerial to non-managerial employees, or as counsel occasionally put it: "the ratio of chiefs to Indians"). The managerial structure is largely determined by the industry and the nature of the work. However, if the bargaining unit is very small, or largely self-directed, a heavy onus lies upon any party asserting an additional managerial exclusion - especially when such managerial function has no historical basis and there is no apparent change in the employer's organization or the work requirements which would justify the creation of a new level of management.

In a collective bargaining context small work groups do not need or necessarily have a "manager" within the meaning of section 1(3)(b), nor do the supervisory, coordinating, or minor admonitory functions performed by "lead hands" or "team leaders" generate the mischief to which section 1(3)(b) was directed.

6. The Board recognizes of course that business organizations and managerial structures can change over time. The employee configuration established on certification is not immutable, and the fact that a disputed person may have been in the bargaining unit at one time is not necessarily determinative of his present status. Jobs evolve. Functions which attract the concern to which section 1(3)(b) is directed may, in practice, be added to or deleted from an employee's regular duties even if there is no formal change in his job title or description; and this, in turn, may warrant an application under section 106(2). We merely reiterate that since "managerial" authority is a matter of degree, it is only concrete experience which will definitively indicate where the

appropriate line should be drawn; and if the alleged “manager” has only a few subordinates, the Board must carefully scrutinize the situation for evidence of independent decision-making authority of the kind which establishes the labour relations concerns underlying section 1(3)(b). In the absence of such concrete evidence, the Board may not be inclined to find in favour of an additional exclusion - especially when a new application can be made if the situation changes, and the mischief envisaged by section 1(3)(b) actually materializes.

7. The difficulty in the present case is not in stating the indicia which, if present, would suggest that someone should be excluded from the bargaining unit either on a “managerial” or “confidential/labour relations” basis. The problem here is to unravel the testimony and determine whether the duties of the disputed individual actually brings him within those parameters. Here we encounter a problem (unfortunately, not unique in this case): at the time of the Officer’s inquiry, Mr. Collins had only been the “yard foreman” for a short period of time. In fact, given the seasonal nature of the marina where Mr. Collins works, he had, at best, only a brief period in which to demonstrate any managerial authority he may have, or exercise any of the managerial functions contemplated by section 1(3)(b). Accordingly, this application may well be premature. Nevertheless, the Board must form an opinion and make a decision based upon the evidence before it.

III

8. As we have already mentioned, Mark Collins is the “yard foreman” of the Town marina. He reports to Bill Smith the marina manager. The marina provides services to the boating public including haulage, storage and launching facilities. It is most active during, and immediately preceding and following the boating season (i.e. from March to about the end of November). There are five seasonal yard workers who are employed during this period, together with a couple of part-time student clerks who work from mid-May to September and a part-time secretary who works from the end of November to March. During the winter the secretary only works for a few hours per week. Mr. Collins has no one under his supervision. He occupies his time with “paperwork” and miscellaneous manual duties.

9. During the boating season, Mr. Collins has continual contact with the marina’s customers and maintains records of their needs or work requirements. He keeps a “launch book” indicating what boats have to be launched or hauled. From this record, he makes up a schedule of duties, which is followed by the yard workers. He has the authority to reorganize or reassign those duties as the work flow requires; however, if there is any problem such as a customer’s failure to appear at the appointed time, Collins consults with Bill Smith. Collins said that he was “in charge” on the two days per week that Smith was not on the premises. There are also periods when some of the employees are working entirely on their own. Collins and Smith are “on call” in case of difficulties. Collins has never been called.

10. Collins has no authority over the employees’ wages and no input or impact on them. He has never disciplined anyone nor has he been told that he has the power to discharge employees. He said that he could point out to employees what they were doing wrong, and could issue a verbal reprimand followed by consultation with Smith. A written reprimand or any more onerous penalty would require consultation with Smith prior to its imposition. Collins could not do it on his own.

11. Mr. Collins has reviewed employment applications and been asked his opinion on prospective employees; however he has never hired anyone independently nor is it clear that his input is qualitatively different from what it was before his purported elevation to the position of “yard foreman”. It is Mr. Smith who does the 3-month appraisal of employees, and although the matter is discussed with Collins, Collins conceded that Mr. Smith also monitors the employees’ performance independently. There is no other evaluation of employees in which Mr. Collins is involved.

Mr. Smith makes any final decision on layoffs or transfers - which, in any event, are largely governed by the marina's fluctuating business. When there is no work to do at all, Mr. Collins tells the employees that they should go home.

12. Mr. Collins fills out the employees' time sheets. He did not know whether his signature was necessary to authorize payment. Any problems with the employees' pay cheques would be taken up with Mr. Smith. Mr. Collins indicated that when the marina was busy, he could authorize overtime but anything unusual such as a 12-hour shift had to be approved by Mr. Smith. Mr. Collins said that he was not really familiar with the terms of the collective agreement. He said that Mr. Smith was responsible for dealing with problems concerning its interpretation, application or administration. Mr. Collins does not attend any meetings of management other than his daily contact with Mr. Smith his superior. Nor does he have any real budgetary responsibilities or control over expenditures.

13. The only real indication in the evidence of the potential mischief underlying section 1(3)(b) concerns the layoff of an individual whom Collins concluded was not working out well. However, even here, he said that "I referred to Mr. Smith to lay this person off which he did after that" and "we laid him off because he was not suitable". Thus, once again, Collins was merely a conduit of information to Smith and it is difficult to conclude just how much independent authority Collins really has.

14. There is no evidence about Smith's other duties around the marina or the amount of time spent by Smith in joint decision-making with Collins. We do know that Collins and Smith consult daily on issues as they arise. We also know that, if the employer's position is accepted, there will be one "manager" for every 3 part-time, student or temporary employees. While this Board has no right to dictate an employer's managerial structure or business organization, that is certainly an unusual situation - bearing in mind that the determination under section 1(3)(b) involves both a qualitative and quantitative assessment, and that, ultimately, the onus rests upon the party seeking exclusion to establish the basis for it.

15. Having regard to the totality of the evidence, the Board cannot conclude that Mr. Collins exercises managerial functions within the meaning of section 1(3)(b) of the Act. It appears to us that such managerial authority (from a collective bargaining perspective) as there is is still exercised by Mr. Smith. It may be that this situation will change if Mr. Collins' job evolves. However, as things now stand, the Board is of the opinion that he is an employee within the meaning of the *Labour Relations Act*.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0328-86-R: Labourers' International Union of North America, Local 247 (Applicant) v. S. D'Amore Mason Contracting Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2008-86-R: Toronto Typographical Union, Local 91 (Applicant) v. London Stamp & Stencil (Ontario) Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

2653-86-R: The International Ladies' Garment Workers' Union (Applicant) v. G.S.E. Inc., c.o.b. as The Great Sewing Exchange (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation" (94 employees in unit)

2816-86-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Globe & Mail, division of Canadian Newspapers Company Limited (Respondent) v. Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild CLC:AFL:CIO (Intervener)

Unit #1: "all employees of the respondent at its Globe & Mail division in the Municipality of Metropolitan Toronto in its composing room, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of January 13, 1987, being the date of the application for certification" (58 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent at its Globe & Mail division in the Municipality of Metropolitan Toronto in its composing room regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and employees in bargaining units for which any trade union held bargaining rights as of January 13, 1987, being the date of the application for certification" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3369-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lopes Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and

that portion of the Town of Milton within geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3394-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Toma Construction Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

3459-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Vistacan Investments Inc., c.o.b. Royal Park Homes (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

3510-86-R: Teamsters, Chauffeurs, Warehousemen & Helpers Local 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Farley Windows Inc. (Respondent)

Unit: "all employees of the respondent in Alexandria, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (47 employees in unit) (*Having regard to the agreement of the parties*)

3511-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. V. Max Carpentry Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3520-86-R: International Ladies' Garment Workers' Union (Applicant) v. Sheldon M. Kasman Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons above the rank of supervi-

sor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period” (64 employees in unit) (*Having regard to the agreement of the parties*)

3542-86-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. The Corporation of the Township of East Ferris (Respondent)

Unit: “all employees of the respondent in the Township of East Ferris, save and except supervisors, persons above the rank of supervisor, office and clerical employees, and persons engaged pursuant to provincially or federally financed work programs” (37 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3543-86-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 537670 Ontario Limited, c.o.b. as Journey’s End Motels (Respondent)

Unit: “all employees of the respondent at 2955 Dougall Avenue, Windsor, save and except assistant manager, persons above the rank of assistant manager, office and clerical staff, front desk staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

3545-86-R: United Steelworkers of America (Applicant) v. Service Familial de la Région de Sudbury Inc. (Respondent)

Unit: “all employees of the respondent in the District of Sudbury, save and except Director General and Clinical Director and persons above the rank of Director General and Clinical Director, Executive Secretary, and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

3549-86-R: Service Employees Union Local 210, affiliated with Service Employees International Union, AFL-CIO:CLC (Applicant) v. Caretaking Standard Labour Services Incorporated (Respondent)

Unit: “all employees of the respondent at its C.S.L. Services Group Division in Windsor, Ontario, save and except supervisors and persons above the rank of supervisor” (13 employees in unit)

3551-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Stop Carpentry (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

3552-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. F. M. Carpentry (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of

Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3567-86-R: Ontario Public Service Employees Union (Applicant) v. Consolidated Maintenance Services Limited (Respondent)

Unit: "all employees of the respondent at 875, 881 and 909 Bay Street, 26 and 36 Breadalbane Street, 26 and 34 Grenville Street West, 5-7 Wellesley Street West, 25 Wellesley Street West and 558 Yonge Street, in the Municipality of Metropolitan Toronto, save and except supervisor and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

3571-86-R: Energy & Chemical Workers Union (Applicant) v. Pennwalt Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Fort Erie, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

3574-86-R: National Automobile, Aerospace & Agricultural Implement Workers of Canada (CAW-Canada) (Applicant) v. W. G. Castings Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Dresden, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0025-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Silverstone Investment Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0028-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Kolico Contracting (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0037-87-R: Canadian Paperworkers Union (Applicant) v. Waldec of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except lead hands, persons above the rank of lead hand, office, clerical and sales staff" (65 employees in unit) (*Having regard to the agreement of the parties*)

0040-87-R: Labourers International Union of North America, Local 183 (Applicant) v. S. A. Carpentry (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, in the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0052-87-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Hydro-Electric Commission of the City of Nepean (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all office and clerical and technician employees of the respondent, save and except those of the rank of supervisor, those above the rank of supervisor, executive secretary, secretary to the assistant general manager/chief engineer and the administrative assistant to the general manager" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0054-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Hinds Brothers Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0055-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Walfoods Limited (Respondent) v. United Food & Commercial Workers, Local 175 (Intervener)

Unit: "all employees of the respondent in the Townships of Bruce and Kincardine, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

0056-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Lucky Star Supermarkets Limited (Respondent)

Unit: "all employees of the respondent in the Town of Dunnville save and except Head Cashier, Produce Manager, and Meat Manager; persons above the rank of Head Cashier, Produce Manager, and Meat Manager, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of April 6, 1987" (6 employees in unit) (*Having regard to the agreement of the parties*)

0072-87-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Thor Equipment Inc., The Thor Group Division (Respondent)

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial

and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0083-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lake Ontario Cement Limited (Respondent)

Unit: "all employees of the respondent at its Hoffman Concrete Division, in the Township of Matilda save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

0087-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Fermont Carpentry (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0089-87-R: United Textile Workers of America (Applicant) v. Hanson Mohawk Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Stratford, save and except foremen, persons above the rank of foreman, office and clerical staff" (50 employees in unit) (*Having regard to the agreement of the parties*)

0091-87-R: Energy & Chemical Workers Union (Applicant) v. Rollit Products Limited (Respondent)

Unit: "all employees of the respondent in Brockville, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0094-87-R: Ontario Public School Teachers' Federation (Applicant) v. The Dufferin County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the County of Dufferin, save and except employees in bargaining units for which any trade union held bargaining rights as of April 9, 1987" (69 employees in unit) (*Having regard to the agreement of the parties*)

0102-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. VMC Rentals (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair-

ing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0105-87-R: United Food & Commercial Workers, Local 175, chartered by United Food & Commercial Workers International Union, CLC:AFL:CIO (Applicant) v. 624643 Ontario Inc., c.o.b. as Parkside Retirement Home (Respondent)

Unit: "all employees of the respondent in Barrie, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

0106-87-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. V. S. Services Ltd. (Respondent)

Unit #1: "all employees of the respondent at Caressant Care Nursing Home in St. Thomas, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at Caressant Care Nursing home in St. Thomas, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (21 employees in unit) (*Having regard to the agreement of the parties*)

0115-87-R: Toronto Printing Pressmen & Assistants Union, Local 10, subordinate to the Graphic Communications International Union (Applicant) v. Smith Folding Cartons Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

0118-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. A. Reisman Construction Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0119-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Brandy Lane Homes Inc. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Towns of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0121-87-R: Service Employees Union, Local 183 (Applicant) v. Hallowell House Ltd. (Respondent)

Unit: "all employees of the respondent in the Township of Hallowell in the County of Prince Edward regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except graduate and registered nurses, supervisor, and office staff" (36 employees in unit) (*Having regard to the agreement of the parties*)

0130-87-R: Canadian Paperworkers Union (Applicant) v. Lyon Reman Lumber Inc. (Respondent)

Unit: "all employees of the respondent in Thunder Bay, save and except owner/manager and persons above the rank of owner/manager" (20 employees in unit) (*Having regard to the agreement of the parties*)

0133-87-R: United Steelworkers of America (Applicant) v. Miller Fluid Power (Canada) Limited (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

0147-87-R: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. McGregor Brothers (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0148-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. J. S. General Construction Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0149-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bonaldi Carpentry Company (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0155-87-R: United Steelworkers of America (Applicant) v. Ideal Roofing Company Ltd. (Respondent) v. J. Dennis Perrier and Jeff Dawson (Objectors)

Unit: "all employees of the respondent in the City of Ottawa, save and except assistant foremen, persons above the rank of assistant foreman, office, clerical and sales staff, and students employed during the school vacation period" (55 employees in unit) (*Having regard to the agreement of the parties*)

0168-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Sudbury Garments Inc. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Sudbury save and except forepersons, persons above the rank of foreperson, and office and clerical staff" (36 employees in unit) (*Having regard to the agreement of the parties*)

0188-87-R: Ontario Nurses Association (Applicant) v. Idlewyld Manor Corporation (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Hamilton, save and except Director of Nursing and persons above the rank of Director of Nursing" (4 employees in unit) (*Having regard to the agreement of the parties*)

0190-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. P. D. Carpentry (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of foreman" (3 employees in unit)

0191-87-R: United Brotherhood of Carpenters & Joiners of America, Local 127 (Applicant) v. Pardy Construction Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0193-87-R: Hillel Academy Teachers' Association (Applicant) v. Ottawa Talmud Torah Board (Respondent) v. Employee (Objector)

Unit: "all employees of the respondent at its Talmud Torah Afternoon School in the Regional Municipality of Ottawa-Carleton, save and except teachers aides, teacher emissaries hired outside Canada through Jewish Educational Agencies, Bar Mitzvah teachers, office staff and the Principal" (13 employees in unit) (*Having regard to the agreement of the parties*)

0194-87-R: United Food & Commercial Workers International Union, Local 1230, AFL:CIO:CLC (Applicant) v. Keve Services Ltd., c.o.b. as First Choice Haircutters (Respondent)

Unit: "all employees of the respondent in the Town of Cobourg, Ontario, save and except Assistant Manager

and persons above the rank of Assistant Manager" (11 employees in unit) (*Having regard to the agreement of the parties*)

0196-87-R: Office & Professional Employees International Union (Applicant) v. The Ontario Teachers' Federation (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto save and except the Manager of Accounting and Fees Department and those above the rank of Manager of Accounting and Fees Department" (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0209-87-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 643210 Ontario Inc., c.o.b. as M. Concrete Forming (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0210-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. S. M. C. Carpentry & Construction Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0220-87-R: International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Applicant) v. Cotain Plastic Products (1980) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, sales, office and clerical staff, persons employed for not more than 24 hours per week and persons employed during the school vacation period" (33 employees in unit)

0256-87-R: Labourers' International Union of North America, Local 607 (Applicant) v. Underground Services Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

0258-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Precision Carpentry Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills

and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0270-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Towland-Hewitson Construction Limited (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and all truck drivers and construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

0350-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Spie Construction Inc. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Unit #2: "all employees of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2795-86-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Mascan Corporation (Respondent)

Unit: "all employees of the respondent at 33, 55, 77, and 201 City Centre Drive, Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and technical employees, persons employed in the construction industry, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit)

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		1
Ballots segregated and not counted		3

2961-86-R: Canadian Union of Public Employees (Applicant) v. Ottawa Civic Hospital (Respondent)

Unit: "all employees of the respondent in Ottawa regularly employed for not more than 37.5 hours per two-week period, save and except professional medical staff, staff of Human Resources Division, president, vice-presidents, the executive assistant to the president, the administrative assistants to the vice-presidents, the department heads and their first assistants, the budget officer, the head orderlies, teaching orderly, the head storekeeper, linen service, supervisors, head messenger, psychologists, orthopedists, food supervisors, intern staff, assistant housekeepers, housekeeping supervisors, supervisor of communications, secretaries to clinical department chiefs, secretary to director of financial services, secretary to director of planning, secretary to director of nursing personnel administration, personnel on educational leave, finance officer/supervisor - reports and analysis, finance officer/supervisor - pre-audit, secretary to director of nursing service, business managers, carpenter foreman, painter foreman, assistant to budget officer, supervisor of duplicating services, supervisor of photography, executive secretaries, the secretaries to the executive assistant and all administrative assistants, medical director, clerical supervisor - nursing payroll office, clinical coordinator - pharmacy,

technical supervisor - radiology and persons for whom any trade union held bargaining rights" (430 employees in unit)

Number of names of persons on revised voters' list		445
Number of persons who cast ballots	212	
Number of ballots marked in favour of applicant		185
Number of ballots marked against applicant		12
Ballots segregated and not counted		15

2999-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Engineered Suspensions (Blenheim) Ltd. (Respondent)

Unit: "all employees of the respondent in Blenheim, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (77 employees in unit)

Number of names of persons on revised voters' list		77
Number of persons who cast ballots	74	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		37
Number of ballots marked against applicant		36

3231-86-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Camco Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Orangeville, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (176 employees in unit)

Number of names of persons on revised voters' list		176
Number of persons who cast ballots	170	
Number of ballots marked in favour of applicant		91
Number of ballots marked against applicant		79

3235-86-R: International Woodworkers of America (Applicant) v. Pack-All Crating (Ontario) Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 2679 (Intervener)

Unit: "all employees of the respondent at Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit)

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		7

3357-86-R: United Headwear, Optical & Allied Workers of Canada, Local 4 (Applicant) v. Imperial Optical Company Ltd. (Respondent)

Unit: "all employees of Imperial Optical Company Ltd. in Niagara Falls, save and except forepersons, persons above the rank of foreperson, licensed ophthalmic dispensers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on list as originally prepared by employer		4
Number of persons who casts ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		0

3363-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lincoln Carpentry Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		2

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of Labourers'		3
Number of ballots marked in favour of Carpenters'		5

3435-86-R: Canadian Paperworkers Union (Applicant) v. The Beaver Wood Fibre Co. Ltd. (Respondent) v. United Paperworkers International Union, Local 228 (Intervener)

Unit: "all employees of the respondent in Thorold, save and except supervisors, persons above the rank of supervisor, Board Mill Superintendent, Plant Engineer, Chief Stationary Engineer, Process Engineer, Newsprint Superintendent, Controller, Secretary to Plant and Office Manager, Chemist, Woods Superintendent, Personnel Manager, Maintenance Superintendent and Watchman, and persons in bargaining units for which any trade union held bargaining rights as of March 19, 1987" (47 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer		47
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		17

3485-86-R: Canadian Union of Public Employees (Applicant) v. The Broadview Foundation (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto at its Chester Village Division, save and except supervisors, persons above the rank of supervisor, professional medical staff, paramedical staff, and office and clerical staff" (94 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		94
Number of persons who cast ballots	80	
Number of ballots marked in favour of applicant		48
Number of ballots marked against applicant		32

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3420-86-R: United Food & Commercial Workers International Union (Applicant) v. Wheaton Industries of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Wheaton Industries of Canada Ltd., in its Wheaton Glass Company Division at Listowell, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (18 employees in unit)

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		6
Ballots segregated and not counted		4

0006-87-R: Ontario Public Service Employees Union (Applicant) v. The Regional Municipality of Halton (Respondent) v. The Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all employees of the respondent at its Halton Centennial Manor at Milton, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate dietitians, student dietitians, office, clerical and technical staff, and students employed during the school vacation and or a cooperative study program at a University or Community College" (230 employees in unit)

Number of names of persons on list as originally prepared by employer		230
Number of persons who cast ballots	194	
Number of ballots marked in favour of applicant		189
Number of ballots marked in favour of intervener		5

Applications for Certification Dismissed Without Vote

0255-86-R: Great Lakes Fishermen & Allied Workers Union (Applicant) v. Kingsville Fishermen's Company Ltd. (Respondent) v. United Food & Commercial Workers International Union (Intervener)

Unit: "all employees of the respondent at its plant in Kingsville, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff" (49 employees in unit) (*Having regard to the agreement of the parties*)

3150-86-R: United Food & Commercial Workers International Union (Applicant) v. W. G. Thompson & Sons Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Blenheim, Ontario, save and except foremen and those above the rank of foreman, office, clerical and research staff" (70 employees in unit)

3324-86-R: International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Bruno Palladino & Son Masonry Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

3486-86-R: Canadian Union of Public Employees (Applicant) v. Upper Canada College (Respondent) (53 employees in unit)

Unit #1: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Director of Physical Plant, persons above such rank, office, clerical and technical employees, teachers and nurses" (6 employees in unit)

Unit #2: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and technical employees, teachers, nurses, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (39 employees in unit)

0163-87-R: Canadian Union of Public Employees (Applicant) v. The Queen Elizabeth Hospital (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nursing staff, graduate and undergraduate dieticians, technical personnel, supervisors and forepersons, persons above the rank of supervisor and foreperson, chief engineers, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of April 15, 1987" (197 employees in unit) (*Having regard to the agreement of the parties*)

0171-87-R: The Public Service Alliance of Canada (Applicant) v. Wagnahgun Security Services (Respondent)

Unit: "all employees of Wagnahgun Security Services at Moose Factory Hospital, Moose Factory, Ontario, employed as watchmen/ambulance drivers, save and except the manager and persons above the manager" (9 employees in unit)

0238-87-R: United Food & Commercial Workers Union, Local 175 (Applicant) v. Canada Safeway Limited (Respondent)

Unit: "all employees employed by Canada Safeway Limited in Thunder Bay as Produce Managers" (18 employees in unit)

0259-87-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. C-Tech Ltd. (Respondent)

Unit: "all employees of the respondent at Cornwall, save and except foremen, persons above the rank of foreman, office and sales staff" (121 employees in unit) (*Having regard to the agreement of the parties*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote**1267-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Omstead Foods Limited (Respondent)**

Unit: "all employees of the respondent engaged in fishing on Lake Erie, save and except those above the rank of Boat Captain" (48 employees in unit)

Number of names of persons on list as originally prepared by employer		48
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		29

2964-86-R: Union des Routiers, Brasseries, Liqueurs Douces et Ouvriers de Diverses Industries, Local 1999 (Teamsters) (Applicant) v. Groupe UniMedia Inc. (Respondent) v. Syndicat Quebecois de l'Imprimerie et des Communications, Local 145 (Intervener #1) v. Ottawa Graphic Communications Union, Local 62N (Intervener #2)

Unit: "all employees of the commercial printing plant of Groupe UniMedia Inc., Division Le Droit, in the City of Ottawa, in the Regional Municipality of Ottawa-Carleton and Province of Ontario, save and except non-working forepersons, and persons above the rank of non-working foreperson, salespersons and security guards" (54 employees in unit)

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	51	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		25
Number of ballots marked in favour of Intervener #1		25

3278-86-R: Teamsters Union, Local 419 (Applicant) v. Howell Warehouses Co. Limited (Respondent) v. (BRAC) Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees (Intervener)

Unit: "all employees of Howell Warehouses Co. Limited in Metropolitan Toronto, save and except foreper-

sons, those above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (31 employees in unit)

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		15
Number of ballots marked in favour of intervener		16

3481-86-R: United Steelworkers of America (Applicant) v. Peelco Manufacturing Limited (Respondent)

Unit: "all employees of the respondent in Oakville, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (214 employees in unit)

Number of names of persons on list as originally prepared by employer		214
Number of persons who cast ballots	201	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		87
Number of ballots marked against applicant		110
Ballots segregated and not counted		1

0038-87-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Custom Trim Ltd. (Respondent)

Unit: "all employees of the respondent at the City of Cambridge, Ontario save and except foremen and supervisors and persons above the rank of foreman and supervisor, office, technical and sales staff, quality control personnel, persons employed for not more than 24 hours per week and students employed during the school vacation period" (82 employees in unit)

Number of names of persons on list as originally prepared by employer		82
Number of persons who cast ballots	67	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		27
Number of ballots marked against applicant		38

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2641-85-R: Teamsters Local Union 141, affiliated with the International Brotherhood of Teamster, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Elgin Handles Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (55 employees in unit)

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	54	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		32

0257-86-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. North Shore Fishery (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Kingsville, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff" (21 employees in unit)

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant		9

Number of ballots marked against applicant

10

1804-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tricil (Sarnia) Limited (Respondent) v. Group of Employees (Objectors) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880 (Intervener)

Unit: "all employees of the respondent in the Township of Morre, save and except supervisor, office and sales staff, dispatchers, employees for whom any trade union held bargaining rights as of September 24, 1986, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a co-operative training program" (4 employees in unit)

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		2

2749-86-R: Ottawa Graphic Communications Union, Local 62N (Applicant) v. Groupe UniMedia Inc., Division Le Droit (Respondent) v. Syndicat Québécois de l'Imprimerie et des Communications, Local 145 (Intervener #1) v. Union des Routiers, Brasseries, Liqueurs Douces & Ouvriers de Diverses Industries, Local 1999 (Teamsters) (Intervener #2)

Unit: "all employees of the respondent at Ottawa employed in its newspaper plant, save and except assistant foreman, those above the rank of assistant foreman, and persons in bargaining units for which any trade union held bargaining rights as of January 26, 1987" (118 employees in unit)

Number of names of persons on list as originally prepared by employer		118
Number of persons who cast ballots	94	
Number of ballots marked in favour of applicant		44
Number of ballots marked in favour of intervener		50

3162-86-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. H. J. Langen & Sons Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week" (36 employees in unit)

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots	37	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		27

3573-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kardinal Coatings Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Dresden, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (16 employees in unit)

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		12

Applications for Certification Withdrawn

1415-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Status Framing Inc., and Allvie Lumber Limited, and Nick Suppa Construction Co. Ltd. (Respondents)

3458-86-R: Canadian Union of Public Employees (Applicant) v. North York Board of Education (Respondent)

3555-86-R: Labourers' International Union of North America, Local 493 (Applicant) v. Ethier Sand & Gravel Limited (Respondent) v. Greater Northern Ontario Truckers Association (Intervener)

0180-87-R: Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Presteve Foods Limited (Respondent)

0143-87-R: Operating Engineers, Local 793 (Applicant) v. Potvin-Scott Contractors Ltd. (Respondent)

0145-87-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bono General Construction Ltd. (Respondent)

0237-87-R: Ontario Public Service Employees Union (Applicant) v. Queen's University (Respondent)

0267-87-R: United Steelworkers of America (Applicant) v. Aluminart Products Ltd. (Respondent)

0397-87-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Dunmark Electric (Ancaster) Ltd. (Respondent)

0448-87-R: United Steelworkers of America (Applicant) v. A. J. Bus Lines Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2728-86-FC: United Food & Commercial Workers International Union (Applicant) v. Formula Plastics Inc. (Respondent) (*Granted*)

0048-87-FCA: United Steelworkers of America (Applicant) v. Walter Tool & Die Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0657-84-R: Teamsters Union, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Brink's Canada Limited and A.T.M. Automatic Teller Machines Services Ltd. (Respondents) (*Granted*)

2272-85-R: Graphic Communications International Union, Local 517 (Applicant) v. Windsor Print & Litho Limited, and Park-n-Print Ltd. (Respondents) (*Dismissed*)

2979-86-R: Toronto Typographical Union (Applicant) v. Ontario Banknote Ltd., and Custom Cheques of Canada, and British American Bank Note Inc. (Respondents) (*Withdrawn*)

3023-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Michele Mas-trangelo Construction Company Limited, and Anzano Construction Company Limited (Respondents) (*Granted*)

SALE OF A BUSINESS

0657-84-R: Teamsters Union, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Brink's Canada Limited, and A.T.M. Automatic Teller Machines Services Ltd. (Respondents) (*Dismissed*)

2272-85-R: Graphic Communications International Union, Local 517 (Applicant) v. Windsor Print & Litho Limited, and Park-n-Print Ltd. (Respondents) (*Granted*)

1931-86-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Red-D-Mix Concrete Company, division of Standard Industries Ltd. (Respondent) (*Withdrawn*)

3023-86-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Michele Mas-trangelo Construction Company Limited, and Anzano Construction Company Limited (Respondents) (*Dismissed*)

3452-86-R: Toronto Typographical Union, Local 91 of International Typographical Union (Applicant) v. Ontario Banknote Ltd., and British American Bank Note Inc. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

0418-86-R: United Food & Commercial Workers, Local 400 (T.O.P.E.) (Applicant) v. Carling O'Keefe Breweries of Canada Limited (Respondent) (*Granted*)

0438-86-R: Independent Local 385 (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 385, and The United Food & Commercial Workers Union (Respondents) v. Coca-Cola Ltd. (Intervener) (*Dismissed*)

2493-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 306 (Applicant) v. Molson Ontario Breweries Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2453-86-R: Wayne Moore and Jim Pascalides (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent) v. Silverspring Limited Partnership (Intervener)

Unit: "all employees of the respondent employed to perform all work associated with building maintenance and janitorial cleaning, including Resident Superintendents (as defined in Appendix "A" of the Collective Agreement) save and except Property Manager, Property Management office and clerical staff, or executive personnel in positions above Property Managers, at and out of such buildings, complexes of buildings or central maintenance departments as referred to in Schedule "A" hereto as the same may be amended from time to time, it being understood that any additions to Schedule "A" be limited to buildings, complexes of buildings or central maintenance departments located within geographic Area No. 8" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1
Ballots segregated and not counted	1

2639-86-R: Maisie Maynard (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. 470187 Ontario Limited (Kennedy Apartments) (Intervener) (*Dismissed*)

3286-86-R: Cindy Lee Gallagher (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. 389393 Ont. Ltd., c.o.b. as Bouchers Amherstview Supermarket (Intervener)

Unit: "all employees of Boucher's Amherstview Supermarket in its store in Amherstview, Ontario, save and except assistant store manager, persons above the rank of assistant store manager, full-time meat department employees, persons regularly employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation periods" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
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Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

3303-86-R: Victor L. Brown (Applicant) v. Teamsters Union, Local 938 (Respondent) (3 employees in unit) (*Granted*)

3328-86-R: Lindsay Richardson (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Greenwin Property Management (Intervener) (*Dismissed*)

3349-86-R: Loretta Przerwa (Applicant) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) v. Parnell Foods (1981) Limited (Intervener) (9 employees in unit) (*Granted*)

3358-86-R: Dorothy Johnson (Applicant) v. Health, Office & Professional Employees International Union, Local 206 (Respondent) v. Tyndall Nursing Home Limited (Intervener) (*Withdrawn*)

3451-86-R: Lou Leduc (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Greenwin Property Management (Intervener) (*Dismissed*)

3502-86-R: Modern Building Cleaning Inc. (Applicant) v. Inter-Provincial Brotherhood of Electrical Workers/Fraternite Inter-Provinciale des Ouvriers en Electricite (Respondent) (15 employees in unit) (*Granted*)

3536-86-R: Richard Lachapelle (Applicant) v. Warehousemen, Transportation & General Workers' Union, Local 715, affiliated with Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) (*Withdrawn*)

0033-87-R: B. J. Lecompte (Applicant) v. United Steelworkers of America, Local 8327 (Respondent) v. Canadian Oxygen Limited (Intervener) (9 employees in unit) (*Granted*)

0034-87-R: Dan McQuade, et al. (Applicants) v. Southern Ontario Newspaper Guild, Local 87 (The Newspaper Guild, AFL:CIO:CLC) (Respondent) (*Withdrawn*)

0080-87-R: Jeanette McMillan, et al. (Respondent) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener) (8 employees in unit) (*Granted*)

0081-87-R: Nicholas Jack, et al. (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. T. Eaton Company Limited (Intervener) (30 employees in unit) (*Granted*)

0092-87-R: Glenn Moir (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) v. Algoma Steel Club (Intervener) (20 employees in unit) (*Granted*)

0134-87-R: Kenneth John Angers, et al. (Applicants) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Respondent) (13 employees in unit) (*Granted*)

0198-87-R: Modern Building Cleaning Inc. (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0167-87-U: Alcan Rolled Products Company Muskoka Works (Applicant) v. The United Steelworkers of America, Local 9096 of the United Steelworkers of America, Lloyd Noble, Frank Wadden, Tim Neal, Elgin Quesnelle, Bill Rettie (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0290-87-U: PCL Industrial Constructors Inc. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 46, Vincent McNeil, Bruce Jackson, Robert Bianchi, James Brown George Hart, David Skinner & Gordon Sellars (Respondents) (*Granted*)

0340-87-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Catalyst Technology (Canada) Ltd. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2898-83-U: Gerald T. Wilkes (Complainant) v. Bruno A. Teichmann, Ben Loughlin, and Teamsters Union, Local 230 (Respondents) (*Dismissed*)

1875-84-U: J. Abramowitz and B. Lyons (Complainants) v. The Ontario Public Service Employees Union, The Ontario Council of Regents for Colleges of Applied Arts & Technology, and The Board of Governors, Sheridan College of Applied Arts & Technology (Respondents) (*Dismissed*)

3392-84-U: Ontario Public Service Employees Union (Complainant) v. Superior Ambulance Limited, R. J. Armstrong, and Al Erlenbusch (Respondents) (*Dismissed*)

0242-85-U; 0243-85-U: I.A.T.S.E., Local 105, London, Ontario (Applicant) v. Tarrant Enterprises Newmarket, Ontario (Tarken Theatres) (Respondent) (*Withdrawn*)

1405-85-U: Ron Gerada (Complainant) v. United Steelworkers of America (Respondent) v. Square D Canada Electric Equipment Ltd. (Intervener) (*Dismissed*)

2410-85-U: International Beverage Dispensers & Bartenders Union, Local 280 (Complainant) v. The Holiday (A Partnership), Holiday Entertainment Inc. (General Partner), formerly Harvey Weisfeld and Alan Charney, c.o.b. as The New Holiday Tavern (Respondents) (*Dismissed*)

2619-85: Randy Russell (Complainant) v. Canadian Union of Public Employees, Local 16 (Respondent) v. The Sault Ste. Marie Board of Education (Intervener) (*Dismissed*)

3007-85-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Huron Steel Fabricators (London) Limited (Respondent) (*Granted*)

0504-86-U: International Union of Operating Engineers, Local 793 (Complainant) v. Downey Building Materials Ltd. (Respondent) (*Withdrawn*)

0936-86-U: Geraldine Elaine Walrond (Complainant) v. Service Employees' International Union, Sunnybrook Hospital Employees' Union, Local 777 (Respondents) v. Sunnybrook Hospital (Intervener) (*Withdrawn*)

1981-86-U: Ontario Public Service Employees Union (Complainant) v. The Drop-In Centre, Kingston Incorporated (Respondent) (*Dismissed*)

2135-86-U: Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Byers-Bush Ltd. (Respondent) (*Withdrawn*)

2162-86-U; 3052-86-U: United Steelworkers of America (Complainant) v. Trim Trends Canada Limited (Respondent) (*Granted*)

2280-86-U: United Steelworkers of America (Complainant) v. Trim Trends Canada Limited (Respondent) (*Dismissed*)

- 2331-86-U:** United Food & Commercial Workers International Union (Complainant) v. J & P Poultry Distributors Limited (Respondent) (*Withdrawn*)
- 2360-86-U:** Michael Baranowski (Complainant) v. Teamsters Union, Local 938, and TNT Canada Inc., c.o.b. as TNT Railfast (Respondents) (*Dismissed*)
- 2399-86-U:** Service Employees Union, Local 183 (Complainant) v. Martin Muhr Investments Inc. (Rubidge Hall Retirement Home) (Respondent) (*Withdrawn*)
- 2460-86-U:** United Food & Commercial Workers International Union, Local 175, formerly Local 409 (Complainant) v. Canada Safeway Limited (Respondent) (*Dismissed*)
- 2513-86-U:** Peniel Cherian (Complainant) v. H.E.R.E., Local 75 (Respondent) (*Withdrawn*)
- 2532-86-U:** Margaret Martin (Complainant) v. Chedoke McMaster Hospital, Brian Page, Ted Capstick (Respondents) (*Withdrawn*)
- 2538-86-U:** John Bartone (Complainant) v. United Food & Commercial Workers' International Union, Local 529A, Roy Reid, and Charlie Borello (Respondents) (*Withdrawn*)
- 2573-86-U:** Southern Ontario Newspaper Guild (Complainant) v. Metroland Printing, Publishing & Distributing, division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)
- 2598-86-U:** Glen Cullen (Complainant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 414 (Respondent) v. The Great Atlantic & Pacific Company of Canada, Limited (Intervener) (*Dismissed*)
- 2764-86-U:** United Steelworkers of America (Applicant) v. Seam Electronics Inc. (Respondent) (*Withdrawn*)
- 2812-86-U:** Teamster Union, Local 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Brytor International (Respondent) (*Withdrawn*)
- 2874-86-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. A. Figliomeni & Sons Limited (Respondent) (*Withdrawn*)
- 2944-86-U:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Complainant) v. Micon Metals Incorporated (Respondent) (*Withdrawn*)
- 3021-86-U:** Barbara Meloche, Pat Sincalir and Pat Gallinger, Negotiating Committee of Extendicare/Oakridge (Complainant) v. Ontario Nurses' Association (Respondent) v. Extendicare Health Services Inc. (Intervener) (*Withdrawn*)
- 3086-86-U:** United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Norwich Packers Ltd. (Respondent) (*Granted*)
- 3141-86-U:** Ontario Nurses' Association (Complainant) v. Dr. Joseph O. Ruddy General Hospital (Respondent) (*Withdrawn*)
- 3178-86-U:** Vincent McManus (Complainant) v. Professional & Clerical Workers (Respondent) (*Granted*)
- 3190-86-U:** United Food & Commercial Workers Union (Complainant) v. Peter Piper Inn (Respondent) (*Withdrawn*)
- 3196-86-U:** Adam Lippert (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE), Local 561 (Respondent) v. Domtar Laminated Products (Intervener) (*Dismissed*)

- 3275-86-U:** Dennis Woodman (Complainant) v. Retail, Wholesale & Department Store Union, Local 414, Domgroup Ltd., and Willet Foods Ltd. (Respondents) (*Dismissed*)
- 3296-86-U:** Richard Kulik (Complainant) v. The United Automobile, Aerospace & Agricultural Implement Workers of America, Local 112 (Respondent) (*Dismissed*)
- 3319-86-U:** Eva Dwornick (Complainant) v. Miracle Food Manager Allan McLeod #260, Representatives Denis Sexton & Fred Tyrell, Store #275 (Respondents) (*Withdrawn*)
- 3322-86-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Kimco Steel Sales Limited (Respondent) (*Withdrawn*)
- 3350-86-U:** Dennis Ferdinand Black (Complainant) v. Retail, Wholesale & Department Store Union, Local 414, AFL:CIO:CLC (Respondent) (*Withdrawn*)
- 3385-86-U:** Ontario Nurses' Association (Complainant) v. Medi Park Lodges Incorporated, c.o.b. as Valley Park Lodge (Niagara Falls) (*Withdrawn*)
- 3440-86-U:** United Steelworkers of America (Complainant) v. Nor-Baker Industries Ltd. (Respondent) (*Withdrawn*)
- 3460-86-U:** Canadian Union of Public Employees, Local 5 (Complainant) v. Royal Botanical Gardens (Respondent) (*Withdrawn*)
- 3468-86-U:** Linda D. Taylor (Complainant) v. Board of Education, and Mr. Healy (Respondents) (*Dismissed*)
- 3469-86-U:** Linda D. Taylor (Complainant) v. Mr. Connely (Respondent) (*Dismissed*)
- 3470-86-U:** Linda D. Taylor (Complainant) v. Mrs. Caruso (Respondent) (*Dismissed*)
- 3487-86-U:** Jean Laniel, and Gilles Laniel (Complainants) v. Eastern Construction (Respondent) (*Withdrawn*)
- 3488-86-U:** Jean Laniel, and Gilles Laniel (Complainants) v. Union Brotherhood of Carpenters & Joiners of America, Local 93 (Respondent) (*Withdrawn*)
- 3557-86-U:** Surjit Singh (Complainant) v. A. G. Simpson Co. Ltd., and Simpson Plant Council (Respondents) (*Withdrawn*)
- 3570-86-U:** Reuben Johnson (Complainant) v. Canadian General Electric (Respondent) (*Dismissed*)
- 0018-87-U:** International Brotherhood of Painters & Allied Trades (Complainant) v. Glassec Industries Inc. (Respondent) (*Withdrawn*)
- 0043-87-U:** United Food & Commercial Workers International Union, Local 233F (Complainant) v. Tony Scutella, Elaine Ferguson, and Susan Shoe Industries Limited (Respondents) (*Withdrawn*)
- 0050-87-U:** Office & Professional Employees' International Union, Local 225 (Complainant) v. Canadian Union of Postal Workers (Respondent) (*Withdrawn*)
- 0070-87-U:** Ontario Nurses' Association (Complainant) v. Pine Villa Nursing Home Inc. (Respondent) v. Canadian Union of Public Employees, Local 3009 (Intervener) (*Withdrawn*)
- 0071-87-U:** Calvin Patterson (Complainant) v. Adidas/Teamsters (Respondent) (*Withdrawn*)
- 0078-87-U:** Estelio Frech, Masoud Sobhi, et al. (Complainants) v. Retail, Wholesale & Department Store Union, Local 1688, The Ontario Taxi Association, and Blue Line Taxi Co. Limited (Respondents) (*Withdrawn*)

- 0097-87-U:** Wilbert Braham (Complainant) v. United Steelworkers of America, Local 2000 (Respondent) (*Withdrawn*)
- 0132-87-U:** Teamsters Union, Local 870, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Alltype Metal Stampings Limited (Respondent) (*Withdrawn*)
- 0158-87-U:** Great Lakes' Fishermen & Allied Workers' Union (Complainant) v. McCormack Fisheries Ltd. (Respondent) (*Withdrawn*)
- 0159-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Franklin Fishery (Wheatley) Inc. (Respondent) (*Withdrawn*)
- 0160-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Batista Fisheries Ltd. (Respondent) (*Withdrawn*)
- 0161-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. H. Tiessen Fisheries Ltd. (Respondent) (*Withdrawn*)
- 0172-87-U:** Labourers' International Union of North America, Local 837 (Complainant) v. Roman Cheese Products Limited (Respondent) (*Withdrawn*)
- 0175-87-U:** Ontario Nurses' Association (Complainant) v. Sudbury General Hospital (Respondent) (*Withdrawn*)
- 0184-87-U:** Daniel Albert (Complainant) v. Canadian Brotherhood of Railway, Transportation & General Workers, Local 268, and Hendrie Transportation Ltd. (Respondents) (*Dismissed*)
- 0206-87-U:** Francesco Femia (Complainant) v. Certified Brakes, division of Lear Siegler Company (Respondent) (*Dismissed*)
- 0242-87-U:** Steve Legault (Complainant) v. Cable Tech & Local 1590 Union (Respondent) (*Withdrawn*)
- 0269-87-U:** Canadian Paperworkers Union (Complainant) v. Lyon Reman Lumber Inc. (Respondent) (*Withdrawn*)
- 0274-87-U:** Cynthia Peterson, Brenda Ashley, and Radiology Nurses' Aides & O.R. Nurses' Aides (Complainant) v. Service Employee's Union, Local 210 & Hotel Due of St. Josephs Hospital (Windsor) (Respondents) (*Withdrawn*)
- 0312-87-U:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. London Soap Company Limited (Respondent) (*Withdrawn*)
- 0336-87-U:** Donna M. Andrew (Complainant) v. R.D.G.W.U., Local 440 (Respondent) (*Withdrawn*)
- 0369-87-U:** Judy Doty (Complainant) v. Peter Mills, President, Teamsters, Chemicals, Energy & Allied Workers Union, Local 1849 (Respondent) (*Withdrawn*)
- 0394-87-U:** International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 105 (Complainant) v. Tarrant Enterprises (Respondent) (*Withdrawn*)
- 0396-87-U:** United Food & Commercial Workers' International Union, Local 175 (Respondent) (*Withdrawn*)
- 0426-87-U:** Canadian Union of Public Employees (Complainant) v. Chateau Park Lodge (Respondent) (*Withdrawn*)

0455-87-U: United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 1230 (Complainant) v. Keve Services Ltd., c.o.b. as First Choice Hair Cutters (Respondent) (*Withdrawn*)

0492-87-U: Ron Lawson, and M. Bazilsky (Complainants) v. B.L.E., Local 295 (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO PROSECUTE

3577-86-U: United Food & Commercial Workers Union, Local 175 (formerly 409) (Applicant) v. Central Hotel (Dryden) Ltd. (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

2922-86-JD: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Complainant) v. Earls court Sheet Metal Mechanical Ltd., and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of United States & Canada, Local 463 (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0005-87-OH: Franco Salerno (Complainant) v. York Volkswagen Ltd. (Respondent) (*Withdrawn*)

0442-87-OH: Paul E. Wright (Complainant) v. Emhart Canada Ltd. Hill Refrigeration (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2659-85-M: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Granted*)

0118-86-M: United Brotherhood of Carpenters & Joiners of America, Local 93, and Richard Restall (Applicants) v. Ottawa-Carleton Bricklaying & Masonry Limited (Respondent) (*Granted*)

0816-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of United States & Canada, Local 800 (Applicant) v. Goldbelt Construction Ltd. (Respondent) (*Withdrawn*)

1229-86-M: Ontario Allied Construction Trades Council, and Operative Plasterers' & Cement Masons' Local 598 (Applicants) v. The Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Dismissed*)

1416-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Status Framing Inc., Allview Lumber Limited, and Nick Suppa Construction Co. Ltd. (Respondents) (*Withdrawn*)

1859-86-M: International Brotherhood of Teamsters Union, Local 91 (Applicant) v. H. J. McFarland Construction Company, division of George Wimpey Canada Limited (Respondent) (*Dismissed*)

2067-86-M: International Union of Elevator Constructors, Local 96 (Applicant) v. Montgomery Elevator Company Limited (Respondent) (*Withdrawn*)

2365-86-M: Labourers' International Union of North America, Local 506 (Applicant) v. Avenue Structures Corporation (Respondent) (*Withdrawn*)

2684-86-M: United Associations of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Earls court Sheet Metal Mechanical Ltd. (Respondent) (*Withdrawn*)

2855-86-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Appli-

cant) v. Cansteel Structural Corp., division of Elmara Construction Co. Ltd., and Elmara Construction Co. Ltd. (Respondents) (*Granted*)

2891-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mastrangelo Construction Company Limited (Respondent) (*Granted*)

3012-86-M: Ontario Public Service Employees Union (Applicant) v. George Brown College of Applied Arts & Technology (Respondent) (*Granted*)

3446-86-M: Labourers' International Union of North America, Local 527 (Applicant) v. Paul Daoust Construction Ltd. (Respondent) (*Withdrawn*)

3449-86-M: CUPE, Local 2189 (Applicant) v. Young Women's Christian Association (Respondent) (*Withdrawn*)

3490-86-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Regional Municipality of Halton (Respondent) (*Dismissed*)

3500-86-M: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Korban Inc. (Respondent) (*Withdrawn*)

0001-87-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Plan Electric (Respondent) (*Withdrawn*)

0036-87-G: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Overhead Acoustics & Drywall Limited (Respondent) (*Granted*)

0063-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. The Kendl Group Inc. (Respondent) (*Withdrawn*)

0064-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Collavino Inc. (Respondent) (*Withdrawn*)

0066-87-G: International Brotherhood of Painters & Allied Trades, Glaziers & Glassworkers, Local 1819 (Applicant) v. Service Glass & Mirror Ltd. (Respondent) (*Withdrawn*)

0079-87-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Bre-Ex Limited (Respondent) (*Withdrawn*)

0110-87-G: Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. D. Gambini Carpenter Ltd. (Respondent) (*Withdrawn*)

0200-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

0201-87-G: Labourers' International Union of North America, Local 182 (Applicant) v. Senator Homes, c.o.b. as Bref Management Inc. (Respondent) (*Withdrawn*)

0202-87-G: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7, Canada (Applicant) v. Joe Arban Contractor Limited (Respondent) (*Granted*)

0214-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fairglan Carpentry Ltd. (Respondent) (*Withdrawn*)

0223-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Aldan Construction Limited (Respondent) (*Granted*)

0225-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

0226-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Lombardi Style Drywall Ltd. (Respondent) (*Withdrawn*)

0241-87-G: Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Applicant) v. National Drywall Ltd. (Respondent) (*Withdrawn*)

0245-87-G: Resilient Floorworkers, Local 2965, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Zeppa Tile Inc. (Respondent) (*Granted*)

0252-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Madesin General Contractors Limited (Respondent) (*Granted*)

0253-87-G; 0254-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Starwick Sudbury (Respondent) (*Granted*)

0255-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Stradwick North Bay (Respondent) (*Withdrawn*)

0264-87-G: International Brotherhood of Painters & Allied Trades, District Council #46 (Applicant) v. Colourific Painting & Decorating Ltd. (Respondent) (*Withdrawn*)

0276-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Batt Holdings Limited (Respondent) (*Withdrawn*)

0293-87-G: Labourers' International Union of North America, Local 625 (Applicant) v. Pavex Canada Limited (Respondent) (*Withdrawn*)

0306-87-G: Labourers' International Union of North America, Local 506 (Applicant) v. P.D.I. Structures Inc. (Respondent) (*Withdrawn*)

0313-87-G; 0314-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. F.E.D. Construction (Respondent) (*Withdrawn*)

0357-87-G: International Brotherhood of Electrical Workers, Local 353, I.B.E.W., C.C.O. (Applicant) v. Ampere-Edko Ltd. (Respondent) (*Withdrawn*)

0358-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. H.H. Robertson Inc. (Respondent) (*Withdrawn*)

0366-87-G: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7, Canada (Applicant) v. Olivieri Masonry Ltd., and Ottawa Carleton Masonry Co. Ltd. (Respondent) (*Withdrawn*)

0376-87-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Limited (Respondent) (*Withdrawn*)

0386-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Concrete Unlimited Inc. (Respondent) (*Granted*)

0387-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. M & C General Contractors Ltd. (Respondent) (*Granted*)

0404-87-G: International Brotherhood of Painters & Allied Trades, Local 1891, and District Council 46 (Applicants) v. Aldan Construction Limited (Respondent) (*Granted*)

0408-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Helmut Krusch Construction (Respondent) (*Withdrawn*)

0409-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Kecman Enterprises Inc. (Respondent) (*Withdrawn*)

0410-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. J & X Interiors Ltd. (Respondent) (*Withdrawn*)

0446-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pe-Ben Pipelines (1979 Ltd.) (Respondent) (*Withdrawn*)

0456-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Eastern Construction Company Ltd. (Respondent) (*Withdrawn*)

0457-87-G: Labourers' International Union of North America, Local 625 (Applicant) v. Van Horne Construction Ltd. (Respondent) (*Withdrawn*)

0458-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. H. H. Robertson Inc. (Respondent) (*Withdrawn*)

0473-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ormersher Decor (1980) Limited, c.o.b. as Decor Insulation & Drywall Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1339-71-R: Metropolitan Plumbing & Heating Contractors Association (Applicant) v. The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Residential Division) (Respondent) v. Toronto Home Builders' Association (Intervener) (*Granted*)

1856-83-R: Lumber & Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. EKT Industries Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 1669 (Intervener #2) v. Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 607 (Intervener #3) (*Dismissed*)

2087-83-M: Labourers International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 607 (Applicants) v. EKT Industries Inc., Tamarron Group Inc., and Tamarron Construction Limited (Respondents) (*Dismissed*)

0434-85-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. S. N. Ventilation Heating Limited, c.o.b. as Steve's Sheet Metal Company (Respondent) (*Dismissed*)

2636-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. U D M Excavating & Contracting Ltd. (Respondent) (*Dismissed*)

2776-85-R: Glass, Pottery, Plastics & Allied Workers International Union, AFL:CIO:CLC (Applicant) v. Kohler Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

0903-86-R: Bernard John Moore, employee of Imperial Clevite Canada Inc. (Applicant) v. International Association of Machinists & Aerospace Workers, Local 1975 (Respondent) v. Imperial Clevite Canada Inc. (Intervener) v. Group of Employees (Objectors) (*Dismissed*)

2471-86-R: Teamsters Local 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Moffatt & Powell Limited (Respondent) (*Dismissed*)

2957-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Marble Arch Investments Limited (Respondent) (*Dismissed*)

RIGHT OF ACCESS

0112-87-M: Canadian Paperworkers Union (Applicant) v. E. B. Eddy Forest Products Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR ACCREDITATION (CONSTRUCTION INDUSTRY)

2211-86-R: Independent Plumbing & Heating Contractors Association (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Respondent) v. Metropolitan Plumbing & Heating Contractors' Association (Intervener) (*Granted*)

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